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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

## No. 485

CHAMPLIN REFINING COMPANY, APPELLANT,

*vs.*

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., ET AL., APPELLEES.

## No. 486

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., ET AL., APPELLANTS,

*vs.*

CHAMPLIN REFINING COMPANY, APPELLEE.

## BRIEF FOR APPELLANT CHAMPLIN REFINING COMPANY.

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HARRY O. GLASSER,
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(36,299-36,300)

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**OCTOBER TERM, 1931**

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## No. 485

CHAMPLIN REFINING COMPANY, APPELLANT,

*vs.*

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., ET AL., APPELLEES.

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## No. 486

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., ET AL., APPELLANTS,

*vs.*

CHAMPLIN REFINING COMPANY, APPELLEE.

---

## BRIEF FOR APPELLANT CHAMPLIN REFINING COMPANY.

---

MAY IT PLEASE THE COURT:

### (a) Opinion of Court Below.

51 Fed. (2d) 823. Also R., vol. 1, pt. 2, pp. 218-248, inc.

The cause having been submitted to a statutory court, decree was entered upon a division thereof. Circuit Judges Cotteral and Phillips upon the majority opinion of the Court (Rec., vol. I, part 2, p. 218). District Judge Kennamer dissenting (Rec., vol. I, part 2, p. 229).

### (b) Statement Upon Which Jurisdiction of This Court is Invoked.

Heretofore printed in conformity with the Rule, and now on file in the office of the Clerk of this Court.

### (c) Statement of the Case.

On September 15th, 1930 (R., vol. I, pt. 2, p. 177), appellant (hereinafter called plaintiff) commenced this suit in equity to restrain Fred Capshaw (then Chairman of the Commission), E. R. Hughes and C. C. Childers, composing the Oklahoma Corporation Commission, from enforcing an Act of the Legislature approved February 11th, 1915, hereinafter referred to as the CURTAILMENT ACT (Okla. Session Laws, 1915, p. 28), as follows:

> "AN ACT defining and prohibiting the waste of crude oil or petroleum, providing for the equitable taking of the same from the ground and conferring authority on the Corporation Commission, prescribing the penalty for the violation of this Act, and declaring an emergency.
>
> "Be It Enacted by the People of the State of Oklahoma:
>
> "Section 1. That the production of crude oil or petroleum in the State of Oklahoma, in such

manner and under such conditions as to constitute waste, is hereby prohibited.

"Section 2. That the *taking* of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma *at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum is hereby prohibited,* and the actual value of such crude oil or petroleum at any time *shall be the average value* as near as may be ascertained in the United States at retail of the by-products of such crude oil or petroleum when refined less the cost and a reasonable profit in the business of transporting, refining and marketing the same, and the Corporation Commission of this State *is hereby* (in) sic *vested with the authority and power to investigate and determine from time to time the actual value of such crude oil or petroleum* by the standard herein provided, and *when so determined* said Commission shall promulgate its findings by its orders duly made and recorded, and publish the same in some newspaper of general circulation in the State.

"Section 3. That the term 'waste' as used herein, in addition to its ordinary meaning, shall include *economic waste, underground waste,* surface waste and *waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands.* The Corporation Commission shall have authority to make rules and regulations for the prevention of such *wastes,* and for the protection of all fresh water strata, and oil and gas bearing strata, encountered in any well drilled for oil.

"Section 4. That whenever the full production from any common source of supply of crude oil or petroleum in this state can only be obtained under *conditions constituting waste, as herein defined,* then any person, firm or corporation, having the right to drill into and produce oil from any such common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom, *without waste,* as the production of the well or wells of any such person, firm or corporation, bears to the total production of such common source of supply. The Corporation Commission is authorized to so regulate the taking of crude oil or petroleum from any or all such common sources of supply, within the State of Oklahoma, as to prevent the inequitable or unfair taking, from a common source of supply, of such crude oil or petroleum, by any person, firm or corporation, *and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.*

"Section 5. *That for the purpose of determining such production, a gauge* of each well SHALL BE TAKEN under rules and regulations to be prescribed by the Corporation Commission, and said Commission is authorized and directed to make and promulgate, by proper order, such other rules and regulations, *and to employ or appoint such agents with the consent of the Governor, as may be necessary to enforce this act.*

"SECTION 6. That any person, firm or corporation, or the Attorney General on behalf of the State, may institute proceedings before the

Corporation Commission, or apply for a hearing before said Commission, upon any question relating to the enforcement of this act, and jurisdiction is hereby conferred upon said Commission to hear and determine the same. Said Commission shall set a time and place, when and where such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein, by publication in some newspaper or newspapers, having general circulation in the State, and in addition thereto, shall cause reasonable notice in writing to be served personally on any person, firm or corporation complained against. In the exercise and enforcement of such jurisdiction, said Commission is authorized to determine any question of fact, arising hereunder, and to summon witnesses, make ancillary orders, and use *mesne* and final process, including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations, as now provided by law.

"SECTION 7. That appellate jurisdiction is hereby conferred upon the Supreme Court in this State to review the action of said Commission in making any order, or orders, under this act. Such appeal may be taken by any person, firm or corporation shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the Corporation Commission. Said orders so appealed from shall not be superseded by the mere fact of such appeal being taken, but shall be and remain in full force and effect until legally suspended or set aside by the Supreme Court.

"SECTION 8. That in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, directly or indirectly *violating the provisions of this act,* shall be guilty of a misdemeanor, and upon conviction thereof, in a court of competent jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000.00), or by imprisonment in the county jail not to exceed thirty (30) days, or by both fine and imprisonment.

"SECTION 9. That in addition to any penalty imposed under the preceding section, any person, firm or corporation, violating the *provisions of this act,* shall be subject to have his or its producing property placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the State through the Attorney General or any county attorney, but such receivership shall only extend to the operating of producing wells and the marketing of the production thereof, under the provisions of this act.

"SECTION 10. That the invalidity of any section, subdivision, clause or sentence of this act shall not in any manner (e)ffect sic the validity of the remaining portion thereof.

"SECTION 11. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist by reason whereof this act shall take effect and be in force from and after its passage and approval." (Italics ours.)

Approved February 11, 1915.

The Oklahoma Legislature has never appropriated any funds for the enforcement of this Act.

In 1927, when overproduction in the oil industry was threatening price level and structure, certain powerful oil producing interests (competitors of the plaintiff company) secured the appointment by the Commission of a production Umpire (privately paid and advised) to prorate the *market*, and determine *potentials* incident thereto, as will be more fully hereinafter set forth.

The Umpire so named has never complied (Rec., vol. I, part 2, p. 285) with the Statutes of Oklahoma requiring its public officer to take an oath of office and has at all times acted in violation of its Statutes, which prohibit any public officer from accepting any compensation from any outside agency or source.

The salary ($24,000 per annum), paid such Umpire by the interested oil producers is more than twice the combined salaries of the three elected members of the Commission, and the findings of the Umpire (and operators' committee) as to market demand, potential capacity of wells and fields, methods of proration, together with the discrimination resulting therefrom, have been fully accepted by the Commission without question in every instance.

Plaintiff is now engaged in the business of producing, refining, transporting and marketing petroleum and its refined by-products in intrastate and interstate commerce. It owns and operates an oil refinery at Enid, Oklahoma, with a capacity of 15,000 barrels of crude oil per day, in which it has an investment of $3,840,038.31. At said plant it manufactures

gasoline, kerosene, lubricating oils, waxes and other by-products of different grades. It owns approximately 735 tank cars of the value of $1,295,202.21, which it uses in the distribution of its refined products, among its customers in some seventeen states. Plaintiff controls and operates approximately 470 miles of pipe lines, representing an investment of $3,146,228.48, and owns and operates a pipe line for the transportation of crude oil from the Oklahoma City oil fields to its Enid refinery, having a carrying capacity of 18,000 barrels of crude oil per day and costing approximately $600,000.00. It owns and operates approximately 263 retail gasoline filling stations and 256 wholesale gasoline stations in several States, its investment in filling stations and marketing equipment, situated in Oklahoma being $1,738,731.40, and that outside of Oklahoma, $1,357,950.48.

The Trial Court found (Rec., vol. I, part 2, pp. 179-182, inc.) that:

> "During the period from July 1st, 1928, to May 31, 1931, 65% by volume, and 70% in value, of the products of its Enid Refinery were transported from its refinery in Oklahoma to other states and sold therein.
>
> "In addition to oil produced from its own wells, plaintiff purchased 4,660,000 barrels of crude oil in 1930 and 4,821,000 barrels in 1929 from other producers for use at its Enid refinery. Its purchases so far during 1931 have been less than in previous years."
>
> • • • • • • •
>
> "Plaintiff has drilled and completed nine producing oil wells on its leases in the Oklahoma

City Field, at an approximate cost of $1,250,000.00 and is now drilling one additional well thereon which will cost approximately $140,000.00.

"Plaintiff has drilled and equipped nine oil producing wells on its leases in the Greater Seminole Field, at an approximate cost of $569,000.00 * * *."

* * * * * * * * *

"The plaintiff has pipe line facilities for transporting 18,000 barrels of oil per day from its wells in the Oklahoma City field to its Enid refinery, and adequate pipe line facilities for transporting the oil from its wells in the Greater Seminole field to its said refinery. It has gas tight, steel storage tanks at its refinery, with a capacity of 55,000 to 80,000 barrels each and a total capacity of 645,000 barrels. It has a market for its refined products. *It has stored no crude oil in earthen storage and permitted none of that produced from its wells to run at large on the surface of the earth, and has not wasted any oil produced from its wells; and all the oil it can produce will be utilized for commercial purposes.* There was no evidence that closing in or pinching in its wells in the Oklahoma City field will cause water to enter the oil and gas sand, or damage its wells, or result in waste of oil or gas."

The plaintiff seeks to enjoin the Commission from enforcing its rules and regulations made under the authority of the Act suppressing and restraining the production of crude oil from certain lands and leases in the Oklahoma Oil fields, by the plaintiff and others similarly situated, to a predetermined market outlet, and challenges the constitutionality of the Act in that same is—

(1) In violation of the 14th Amendment to the National Constitution in that it deprives plaintiff of (a) its property without due process of law, (b) the equal protection of the laws, (c) its liberty of contract, and—

(2) Is a burden upon interstate commerce in violation of Clause 3, Section 8 of Article I of the National Constitution,

and challenges the constitutionality of the rules and regulations, in that if the Act within itself is not in violation of the National Constitution, then the Commission exceeded its authority in making and attempting to enforce its orders and regulations and has been and now is attempting to enforce said Act in an unconstitutional manner, in that its orders and regulations made under the purported authority of the Act operate to deprive plaintiff of (a) its property without due process of law, (b) equal protection of the laws, (c) liberty of contract, (d) constitute an unwarranted interference with and burden upon interstate commerce in violation of Clause 3, Section 8, of Article I of the National Constitution, and (e) violate the Anti-Trust Laws of the United States.

The plaintiff for its statement of the facts, says that from the time of the approval of said Act until in October, 1926, the State of Oklahoma was producing crude oil in great quantities, upon a satisfactory market demand, and as a result of exploration there had been opened for development a number of great producing fields within the State, the principal of which was the *Greater Seminole*. Production within that area at that time had reached such proportion that "proration of production to market outlet" (by agreement of the operators) was put into effect (R., vol. I, pt. 2, pp. 279-280).

That, E. B. Reeser (until recently President of the American Petroleum Institute), of the Barnsdall Corporation (R., vol. I, pt. 2, p. 284), along with Dan Kelsey (of the Prairie Oil & Gas Company), first approached Ray Collins during October, 1926, in the interest of the producers in the Seminole area for the purpose of securing the services of Collins as (an unofficial) production Umpire (R., vol. I, pt. 2, p. 279).

A meeting of producers in the Seminole area was at that time held in this connection in the headquarters of the Mid-Continent Oil & Gas Association at Tulsa, Oklahoma (R., vol. I, pt. 2, p. 279).

Collins was employed by agreement (with such producers) as such Umpire at a salary of $24,000 per year, and was allowed in addition thereto an expense account, which was, until February, 1927, collected from operators in the Seminole area and disbursed by the Barnsdall Company (R., vol. I, pt. 2, p. 280).

In February, 1927, a new engagement at a like salary as such unofficial Umpire, in the Seminole area,

was made with Collins by a committee, of which Cole, of the Pure Oil Company, was Chairman, and Moody (of the Mid-Continent), McArthur (of the Barnsdall), Connery (of the Carter, a subsidiary of the Standard of New Jersey), and Pringle (of the Tidewater of Bayonne, New Jersey), were also members (R., vol. I, pt. 2, p. 280),

> "not a single member of which Committee represented any ownership *that is now* in the Oklahoma City field,"

(R., vol. I, pt. 2, p. 281), which fact becomes of significance in the discrimination in permitted production with allocation of market demand that will be shown (this brief, pages 18, 19 and 111) to have been subsequently practiced in favor of the Seminole area against the Oklahoma City field (in which this Plaintiff has its principal producing properties), notwithstanding the "potential" production of the Oklahoma City field was at all times approximately four times greater than Seminole.

The *control* thus fixed in this Committee, and its membership in succession, has remained definitely *constant*.

The membership of the Committee on the first of August, 1927, was composed of McArthur (of the Barnsdall), who has always functioned, Connery (of the Carter Company), Nicholas (then of the Texas Company), Pringle (of Tidewater), and Cole (of the Pure Oil Company), when the first appeal was made to the Corporation Commission that the Seminole Pool be *prorated to the outlet*; that Collins was then (August, 1927) named as Umpire *by this Committee*

(R., vol. I, pt. 2, p. 282), and at that time (Oct. 6, 1927) was first approved by the Commission as *Official* Umpire and continued at all times herein to so serve, without ever at any time having taken an oath of office as such officer (R., vol. I, pt. 2, p. 285).

Since that time a General Committee that supervises the whole arrangement, so far as the Mid-Continent Oil & Gas Association is concerned, has been named by certain of the operators. That Committee is composed of Sidwell (of the Prairie Oil & Gas Company), Filley (of the Texas Company), Nicholas (formerly of the Texas Company, now of Continental), Blue (of the Indian Territory Illuminating Oil & Gas Company, a Cities Service subsidiary), Young (of the Carter Oil Company), Richards (of the Pure Oil Company), Davis (of the Phillips Petroleum Company), and Fell, representing operators in Southern Oklahoma.

This Committee functions as a *fact-finding* and advisory committee, determining the facts as to *potential* production and (market) *demand* for crude oil in Oklahoma, making recommendations to the operators "over in the Seminole or other parts of the State" (R., vol. I, pt. 2, p. 283), and gets most of its information upon which it makes its recommendations from the Umpire (Collins), and a statistician (Mapes), employed by the Mid-Continent Association (R., vol. I, pt. 2, p. 284).

One Otto Bradford was appointed Umpire for the Oklahoma City field by the operators of that field, and privately paid for his services in the manner indi-

cated by the witness, McLennon (R., vol. I, pt. 2, p. 301), no part of such expense ever having been borne by the State of Oklahoma, and while Collins was Umpire for the entire State, his salary and all other expense incident to his office, was entirely borne by *Seminole operators,* as fully explained by the witness Chesbro (Asst. Treas. Carter Oil Company; R., vol. I, pt. 2, p. 300).

It must also be remembered that the Legislature, although in regular session while this case was being heard and decided (February 9th, 1931) upon the application for a temporary injunction, failed (R., vol. I, pt. 2, p. 303), as all other legislatures since the passage of the act have likewise failed, to make any appropriation for its enforcement. The operation of the law required the continuation of the policy adopted in 1927, when the Act was first invoked, of permitting a subsidiary of the Standard Oil Company of New Jersey (Carter Oil Company), or some other interested major producing company (Barnsdall Refining Company), to continue to collect from producers in the Seminole (favored in allocation of market demand) area, and disburse by such company's check the entire expense of State-wide Proration outside the Oklahoma City field (See Exhibit No. 15, R., vol. II, pt. 1, pp. 9 and 10), and at the same time accept the somewhat like beneficence in the Oklahoma City field (separately so treated for some unexplained reason) from some twenty of the fifty operators in that field (R., vol. I, pt. 2, pp. 302 and 303).

Exhibit No. 19 (R., vol. II, pt. 1, p. 14a) discloses, in

detail, the total pipeline runs for the Greater Seminole area for the period from October 18, 1929 to June 1st, 1931; with the total account of each producer for whom such oil was so run by the respective pipeline companies during said period of time.

Exhibit No. 20 gives in detail, the like information for the Oklahoma City producing area for the first six months of 1931 (Rec., vol. II, part 1, pp. 15 to 29, inclusive), with the explanation (Rec., vol. II, part 1, p. 15) that the Umpire's office,

> "was unable to furnish (plaintiff) with production, or pipeline figures previous to January 1st, 1931, due to the fact that this (Oklahoma City) field was operated on the *'time basis'* from October, 1929, to January 1st, 1931.".

See tabulation, volume I, part 1, page 136, of data set forth in said above identified Exhibits Nos. 19 and 20.

Production allowed under *proration* for all fields in Oklahoma, has always been limited to the pipe line companies' "nominations". That such *nominations*, so made to the Umpire, represented the quantity of crude oil which the marketers, purchasing companies, refiners and pipe line companies were willing to "take out of those fields" (at the posted price), (Rec., vol. I, pt. 2, p. 290); which information so passed on as the *market demand*, to the General Advisory Committee (hereinbefore identified), for that Committee's determination of the percentage of potential production to be allowed each field, to exactly produce such quantity, in such proportion from such of the fields of the State as the Committee might determine; concretely repre-

sents the working of *proration*, and makes possible the discrimination (upon the authority of the Orders of the Commission) that has been practiced between fields in Oklahoma, ostensibly in the interest of conservation.

The Seminole field is served by pipe lines of a total daily capacity of 468,200 barrels (Exhibit 16, R., vol. 2, pt. 1, p. 11), owned by 19 companies.

Six of these companies, Empire, Oklahoma Pipe Line (Carter), Prairie, Magnolia, Stanolind and Shell, the first three of which are represented on the General Advisory Committee, and all of whom are among or affiliated with major producers and refiners of the United States, own pipe lines with a total daily capacity of 290,000 barrels (63.57% of the total) in the Seminole field (Exhibit 16, R., vol. 2. pt. 1, p. 11), and own lines in the Oklahoma City field (Exhibit 17, R., vol. 2, pt. 1, p. 11), with a total daily capacity of 203,500 barrels (68.75% of the total in that field).

The "market demand", being based upon pipe line "*nominations*", must necessarily depend upon the attitude of these six companies, because of the magnitude of their ownership of pipe lines and/or crude oil producing properties.

The "*nominations*" so made resulted in Commission Orders allowing production of 85,000 barrels daily for the Oklahoma City field, during the month of January 1931, when the prevailing posted price for oil of 38 gravity was $1.01 per barrel (R., vol. 2, pt. 1, pp. 3 and 84A) whereas, the allowable production in the Seminole area for the identical period was 188,366 barrels daily (R., vol. 2, pt. 1, p. 3). For the month of

June, 1931, when the prevailing posted price for oil of 38 gravity had dropped to 63 cents (R., vol. 2, pt. 1, p. 84A), the allowable for Seminole remained at 179,310 barrels (R., vol. 2, pt. 1, pp. 6-9), while the allowable production in the Oklahoma City field was increased to 161,602 barrels daily (R., vol. 2, pt. 1, pp. 12-14).

In other words, the operators in the Seminole field (in control of Proration), were willing to allow the increase in the market demand from January to June, to go to the Oklahoma City field, when the price declined below a remunerative basis.

It is proper in this connection to ascertain if any of these companies were influenced in their *"nominations"* by the ownership of production in either of the fields.

In the Seminole we find the following:

| | Pipeline capacity Exhibit 16 (R. vol. 2, pt. 1, p. 11). | Percent of total P. L. capacity in field. | June allowable production from their leases Exhibit 14 (R., vol. 2, pt. 1, p. 7). | Ratio their allowable production to their P. L. capacity. |
|---|---|---|---|---|
| Empire (affiliated with I.T.I.O.) | 10,000 | 2.19 | 5,403 | 54.03 |
| Oklahoma Pipe Line Co. (Carter) | 55,000 | 12.06 | 17,359 | 31.56 |
| Prairie | 110,000 | 24.11 | 16,628 | 15.11 |
| Magnolia | 25,000 | 5.48 | 12,133 | 48.53 |
| Stanolind | 72,000 | 15.78 | 410 | .57 |
| Shell | 18,000 | 3.95 | 4,563 | 25.35 |
| Total | 290,000 | 63.57 | 56,396 | 19.45 |

2m

In the Oklahoma City field the following condition existed:

| | Pipeline capacity Exhibit 17 (R. vol. 2, pt. 1, p. 11). | Percent of total P. L. capacity in field. | June allowable production from their leases Exhibit 14 (R., vol. 2, pt. 1, p. 12). | Ratio their allowable production to their P. L. capacity. |
|---|---|---|---|---|
| Empire (Affiliated with I.T.I.O.)... | 40,000 | 13.52 | 540<br>35,352 | 89.73 |
| Oklahoma Pipe Line Co. (Carter) | 20,000 | 6.76 | none | ..... |
| Prairie..... | 45,000 | 15.20 | 1,031 | 2.29 |
| Magnolia..... | 26,000 | 8.78 | none | ..... |
| Stanolind..... | 60,000 | 20.27 | none | ..... |
| Shell..... | 12,500 | 4.22 | 229 | 1.83 |
| Total..... | 203,500 | 68.75 | 37,608 | 18.48 |

The Empire, in affiliation with I. T. I. O. (both Cities Service subsidiaries), in June of 1931, was by the orders permitted to produce in the Oklahoma City field, 35,892 barrels of oil daily, which quantity would have utilized 89.73% of their pipe line capacity in that field. Such privilege, as evidenced in these comparisons in figures, will always remain intrenched and staunchly defended.

Exhibit No. 11 (R., vol. 2, pt. 1, p. 3) discloses that the Oklahoma City field, in January of 1931, had 86.2% of the total *potential* production of the State, but was allowed to produce only 16.8% of the total *market demand* of the State; while the Seminole field, with 8.5% of the total *potential* production of the State. was allowed to produce 37.2% of the market demand of the State.

If the estimated potential of the Oklahoma City field of 5,388,298 barrels daily, as shown in Exhibit 11

(*supra*), had been calculated under the rule adopted as the Revised Formula by the Commission on February 10, 1931 (Exhibit 33, R., vol. 2, pt. 2, p. 206, paragraph 5), the Exhibit would have reflected the following:

| | | |
|---|---|---|
| *Estimate Potential Revised:* | | |
| Oklahoma City | 1,796,099 | 67.5% |
| Seminole | 533,918 | 20.0% |
| Balance of State | 330,003 | 12.5% |
| Total | 2,660,020 | 100.0% |
| *Allowable Production:* | | |
| Oklahoma City | 85,000 | 16.8% |
| Seminole | 188,366 | 37.2% |
| Balance of State | 232,729 | 46.0% |
| Total | 506,095 | 100.0% |

The prevailing price for crude oil posted by the Prairie and/or Stanolind Pipe Line Companies, in the Mid-Continent fields long recognized as final arbiters in such privilege resulted in a decided advantage in the marketing of the products refined therefrom, to those companies *producing* their requirements in Seminole, as against those companies (situated as plaintiff) that were compelled by curtailment in the Oklahoma City field, to *purchase* crude oil for refinery needs, upon the market.

As illustrative of such handicap, the record reveals that when the posted price of 38 gravity Oklahoma City crude, on October 25th, 1930, was $1.01, the cost of manufacturing a barrel of such crude into its by-products when so purchased, was approximately 35c,

and the transportation cost thereof was 5c per barrel, making the total cost, if so purchased during such period, of approximately $1.41 per barrel, while the market value of the refined products therefrom was $1.64 (R., vol. 1, pt. 2, p. 311). On March 5th, 1931, the posted price of 38 gravity Oklahoma crude in the Oklahoma City field was 63c per barrel, the cost of manufacturing and transporting remained the same; and the market value of the refined products therefrom was $1.37½ (R., vol. 1, pt. 2, pp. 311-312). On June 1st, 1931, the posted price of 38 gravity Oklahoma crude in the Oklahoma City field was reduced to 35c per barrel, the cost of manufacturing and transporting remained the same, while the market value of the refined products therefrom was $1.01 (R., vol. 1, pt. 2, p. 312).

The manufacturing cost of 35c per barrel used in the foregoing calculations does not make any allowance for depreciation, upon the cost of physical equipment (in excess of six million dollars) so employed. The lifting cost of one barrel of oil in the Oklahoma City field during all the period of time was approximately 5 3/10c, and the approximate transportation cost during all the period of time was 5c per barrel (R., vol. 1, pt. 2, p. 312).

The entire arrangement is a price-fixing one (see Journal Entry No. 1856, Rec., vol. II, part 2, pp. 231 to 233, inc.) putting a burden upon interstate commerce (65% to 75% of all crude oil produced in Oklahoma having been found by the Commission to move in interstate commerce, Rec. vol. II, part 2, p. 135) and is plainly designed to create monopolistic control of the

industry in the executive officers of the producing and transporting branches thereof, which are in turn affiliated with major refining interests wholly outside Oklahoma.

The details of the operation of *proration* in Oklahoma are fully set forth in a series of orders of the Commission (which best speak for themselves), each written along the lines of a general type but of sufficient change in detail to require an examination of the whole thereof for a complete understanding of their scope and purpose.

Commencing with the base order of June 30, 1930, No. 5189, the entire series in chronological order, including No. 5549 of June 29, 1931, are set forth in their entirety in volume II, part 2, of the Record, pages 85 to 221, inclusive.

Journal entires (which do not have the dignity of orders) commencing with No. 1795, dated June 30, 1930, and ending with No. 1880 of April 15, 1931, also fully set forth in volume II, part 2 of Record, pp. 221 to 240, inclusive, should be read in their entirety.

Using Order No. 5189, *supra,* for illustration of the plan of operation, it will be noted that the Commission prohibited during the months of July, August and September, 1930, sixteen separate oil pools within the State from producing more than 66⅔% of their capacity; prohibited two pools from producing more than 33⅓% of their capacity, and prohibited three pools from producing more than 25% of their capacity and found that the Oklahoma City pools' capacity for July, August and September was 600,000 barrels per day, and allowed production of only 130,037 barrels (21.6%) for

July, 134,760 barrels (22.3%) for August and 146,933 barrels (24.5%) for September, and required each well in the Oklahoma City field to remain shut down for 65 days after coming in, each well in the East Earlsboro field to remain shut down for 49 days and all wells coming in in five other fields to remain shut down for 24 days each (Rec., vol. II, part 2, p. 100).

(In Orders No. 5246 of July 24, 1930, No. 5292 of August 30, 1930, No. 5369 of October 28, 1930, and No. 5413 of December 30, 1930, *supra*, the foregoing respectively identified groups of fields were likewise curtailed in varying percentages according to potential capacities of each well as set forth in detail in such orders. (Rec., vol. II, part 2, pp. 101, 108, 124, and 159.))

The basic justification for proration (as practiced) must be found in Order No. 5189, *supra*, for all subsequent or supplemental orders are but a continuation thereof with amplification in detail of the general plan there devised; and it is quite certain that whatever cause or causes for the institution of proration that may have then existed, did not in the course of time become more definite, urgent or necessary.

The substance of Order No. 5189, *supra*, is as follows:

(*a*) that certain pools (named) will be subject to the rules,

(*b*) that notice to all persons interested has been given by publication,

(*c*) that an *over-production* of crude oil in Oklahoma, is attended by *waste of gas* and *gas*

*pressure,* and that oil producers are *threatening* to and *will* commit *physical waste* of crude oil, *economic waste, under-ground waste, surface waste* and *waste* incident to the production of crude oil in *excess* of transportation or marketing facilities, or reasonable *market demands,* unless such Order be entered;

that there is a general over-production, and importation of crude and refined petroleum in the United States;

that the daily *potential* supply of the United States is 5,030,000 barrels as against an approximate daily demand of 2,840,000 barrels;

that unless there is a continuance of curtailment of production (in Oklahoma), the *conservation measures* now in effect *in other oil producing* states may be abandoned, resulting in large quantities of crude oil being produced in such other states, to the *demoralization of the industry,* with consequent *reduction* in demand for crude oil, with a corresponding increase in *waste* (not otherwise defined) and an undue exhaustion of our oil resources;

that such situation constitutes a great *state emergency* and that the laws of the State and powers of the Commission should be availed of to remove the same;

(*d*) that in addition to the foregoing, there are stocks of petroleum on hand in the United States aggregating more than 698,000,000 barrels;

that by reason thereof, *purchasers* of crude oil in Oklahoma are unwilling to purchase crude oil in Oklahoma *for storage* in any amount that would be adequate to take care of surplus of *potential* production over current demand, and that therefore, much oil *would go to earthen storage* where is would evaporate and thus be wasted;

that there is already an excess of oil stored locally, which will cause deterioration (in what manner not indicated);

(*e*) that to *curtail* production to reach the end desired, *proportionality of taking* must be invoked, to prevent *injustice* and *drainage* from one lease to another as well as the utilization by some operators of an undue proportion of gas pressure;

(*f*) that the daily *potential production* of existing wells in Oklahoma for the months of July, August and September, 1930, will be approximately 1,362,000 barrels and the daily *demand* (not otherwise amplified), will be approximately 650,000 barrels; that therefore an excess of potential production over *consumption* of 712,000 barrels daily cannot be produced without *waste* (not otherwise defined), as defined by the Statutes of Oklahoma;

that if no restraint were put upon producing wells now completed, or upon wells hereafter drilled during July, August and September, 1930, the *potential* production would be much

greater than 1,362,000 barrels, and would exceed all transportation and marketing facilities, and *reasonable market demands,* as to force large quantities of oil into *earthen storage* and otherwise cause *waste* (not otherwise defined) of a character prohibited by the laws of the State of Oklahoma;

that a subjoined schedule of production interesting in the detail of its percentage discrimination is then adopted (Rec., vol. II, part 2, pp. 89-91, inclusive);

(*g*) an attempted justification for such discrimination is thereupon made, for the following reasons:

1. In order to reduce *production* in this State to *demand,* in a manner least injurious to the producers and royalty owners as a whole;

2. To prevent unfair and unreasonable discrimination in favor of any one pool or common source of supply against another;

3. That proration should be applied to the *flush* and *semi-flush* pools, as distinguished from the old small wells in the State for some seven reasons, which are set out in full on pages 91 and 92 of Rec., vol. II, part 2.

(*h*) That the *varying percentages* of *curtailment as between pools,* as set forth in paragraph (*f*) (*supra*) of this Order, are *necessary, fair* and *reasonable,* because of the peculiar conditions in each case, and in this to-wit:

*First.* That said pools are not all served in common by the same pipelines and purchasers;

*Second.* That the outlet for certain of them is greater in proportion to potential production than in the case of others;

*Third.* Some of them are older than others;

*Fourth.* And have been prorated longer than others, under orders of the Commission, with a consequent greater reduction in potential flow and smaller possible production per well per day, and are therefore accorded a higher percentage allowable production;

*Fifth.* That in many cases individual pools are served by local purchasers;

*Sixth.* That in certain of the pools the sand and water conditions prevent as great curtailment as is possible in others;

*Seventh.* That in certain pools there is a *more intensive drilling campaign* and *wells of larger capacity* than in others.

That in the making of said schedule in paragraph (*f*) (*supra*), the producers and purchasers in all of said pools, were consulted, and meetings of all of said producers and purchasers were held at which all of the foregoing factors were considered, and that said *schedule represents the consensus of opinion of said producers and purchasers* as to reasonableness of arrangement, necessity and convenience of producers and purchasers, and equity as between the various common sources of supply, and was agreed to by all producers and purchasers except one.

(*i*) That by virtue of the facts as herein set forth, it is necessary:

*First.* To curtail production in each of the pools herein mentioned, in order to reduce the output of the State to *consumption demands* from the State as a whole, and thus to avoid *waste* (not otherwise defined).

*Second.* That the plan and schedule of percentages as contained in paragraph (f) (supra), are necessary to be observed in the case of each lease, in order to prevent the inequitable or unfair taking by any person, firm or corporation, from any one of said pools, as a common source of supply;

and,

*Third.* To prevent unreasonable discrimination in favor of any one such common source of supply, as against another;

and,

*Fourth.* By virtue of the further fact that no one purchaser, nor all of the purchasers together, and no one pipeline or transporter, nor all pipelines and transporters together, is, or are able, or willing to purchase and/or transport all of the oil from all of said pools, it is necessary that each purchaser and transporter from each of said pools conform and apportion his takings from each lease and pool to the percentages of potential output applicable thereto, as set forth in said schedule contained in paragraph (*f*) (*supra*);

*Fifth.* That if any purchaser or transporter should fail or refuse to so conform, but should

violate the plan as set forth in paragraph (*f*) (*supra*), by taking more than the due proportion as fixed by said plan, from any lease or leases in the said prorated areas, his action would have the immediate effect of discriminating against and of doing injury to surrounding owners by drainage and *disproportionate use* of the gas pressure and of creating discrimination as between pools; and would have the further effect of hindering, impeding or disrupting the whole plan or scheme for the prevention of *waste* as adopted and promulgated by the Commission.

For these reasons, the purchasers and transporters now serving each or any of said pools, or who may hereafter do so, are hereby made parties to this proceeding, and said purchasers and transporters are hereby prohibited from violating the rules, regulations and orders of the Commission as herein set forth, or in any manner aiding or abetting said producers in so doing.

(*j*) That in addition to the prevention of *waste* of crude oil, the establishment of the curtailment plan in this order set forth, will *tend to conserve* natural gas and gas pressure in the pools to which it shall be applied.

(*k*) That the output from the Oklahoma City pool should be limited to the reasonable *market demand* from said pool, which at the present time is about 16⅔% of the *potential production*, but which may increase to as much as 25% of the *potential production*, and therefore the

maximum permitted production should be left at 25% of the potential, as in existing orders; and that the *Umpire* and *Operators' Committee*, are *authorized to fix* from time to time the rate of curtailment necessary in said area, in order to conform the actual production to the *actual demand* from that area, with a maximum allowance of 25% of potential; it being understood, however, that whatever *demand* there is in the Oklahoma City pool, shall be prorated among all of the producing leases therein.

(*l*) With reference to East Earlsboro, the Commission finds that said pool is on the decline and owing to the possibility that said decline may be more rapid than is now estimated, it should be ordered that a minimum allowed production of 20,000 barrels per day for the East Earlsboro pool be specified; so that if the application of a curtailment of 66⅔% of the potential should at any time reduce the allowed production below 20,000 barrels per day for the pool as a whole, the *Umpire* and *Operators' Committee*, shall have *authority* to readjust the percentage so that a minimum production of 20,000 barrels per day from the pool as a whole, shall be allowed.

(*m*) The Corporation Commission finds that new pools of sands which may be opened up between July 1st and September 30th, 1930, should be curtailed 75% of potential, until otherwise ordered by the Commission.

> (n) That the allegations of the Petition filed herein, are true, and that accordingly these conditions of *waste* now exist in said pools, and *commission of waste* is imminent, and the same should be prohibited and prevented, and the following rules and regulations are necessary, reasonable and appropriate for that purpose;
>
> It is therefore ordered, * * *

The foregoing findings were thereupon made effective by the Order, and in addition thereto the following Thirteenth Subdivision of the Order was entered, as follows:

> "All purchasers and carriers of oil in the State of Oklahoma, are forbidden to purchase or carry oil produced in violation of these orders,"

which provision (with its burden upon interstate commerce), was, in form, carried throughout the orders. (Rec., vol. II, part 2, pp. 100-106-115-141-174-207.)

Upon the submission of the cause to the Statutory Court, the adoption of thirty-one voluminous and greatly involved special findings of fact (Rec., vol. I, pt. 2, pp. 177-212, inc.) sustaining the defendant's theory of the case below resulted in the following conclusion by a majority of the Court:

> "The theory upon which the Orders are predicated is that oil from a given pool shall not be produced in excess of the market demands therefor in order to prevent wasteful storage and

## SUMMARY AND INDEX OF ARGUMENT.

**First: The Act is Unconstitutional** (pp. 32-69)

**In that:**

**I. It is violative of the Fourteenth Amendment, because it:**

1. **Is a deprivation of property without due process of law,**
2. **Denies the equal protection of the laws, and**
3. **Denies the liberty of contract,**

for the following reasons, to wit:

(*a*) The business of producing and marketing crude oil is not a public service business, nor does the producer devote his property to a public use (p. 32).

(*b*) The land owner, or his lessee, has a vested property right to drill wells on his land, penetrate the underground reservoir, and take all the NATURAL flow of oil and gas therefrom so long as he does so without physical waste, and devotes the production to useful purposes (pp. 32-46).

(*c*) Assuming the Legislature, in the exercise of the police power, may limit or restrain the production of oil for useful purposes, without actual physical waste and authorize the Commission to make rules and regulations for its enforcement, nevertheless, Section 2 of the Act, authorizing the Commission to ascertain "the actual value of such crude oil or petroleum", record its findings and "publish the same in some newspaper of general circulation in the State", and prohibiting the "taking of crude oil or petroleum from any oil bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefor at the wells at a price equivalent to the actual value of such crude oil or petroleum", is a price fixing law and void under the Fourteenth Amendment to the National Constitution (pp. 46-48).

(*d*) Section 2 of the Act—the section expressly conferring price-fixing powers on the Commission—is an inseparable part of the statute, being the very keystone of the whole legislative arch, and therefore either renders the entire act void under the Fourteenth Amendment or furnishes such key to the meaning and effect thereof as to render the entire act void (pp. 48-60).

(*e*) If Section 2 of the Act is unconstitutional, then the remaining portions of the act are too uncertain and indefinite to confer upon the Commission the power and authority it seeks to exercise through its rules and regulations, in that the Act does not define economic waste or waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands, and does not confer authority upon the Commission to define such waste, and if it does confer such authority then it is void because in violation of Section 1, of Article 4, of the State Constitution, dividing the powers of government into three separate departments, and Section 1, of Article 5, of the State Constitution, vesting the legislative power in the Legislature (pp. 60-61).

(*f*) Assuming that Section 2 of the Act is severable, the Act is nevertheless unconstitutional for the reason that Section 3 thereof is plainly for the purpose and has the necessary effect of authorizing an agency of the State to control prices for the benefit of a particular class—the oil producers (pp. 62-63).

(*g*) Even if proration of production, to meet market outlet, could be justified under the Fourteenth Amendment, the basis of such proration in the instant case is clearly inequitable, and involves a taking without due process of law, and is a denial of the equal protection of the laws (pp. 63-69).

II. It is a burden upon Interstate Commerce (pp. 123-132).

**Second: The Orders (Rules and Regulations) of the Corporation Commission are Unconstitutional** (pp. 70-123).

The Commission has administered the Act in an unconstitutional manner, so as to deprive the appellant of:

1. Its property without due process of law,
2. The equal protection of the laws, and
3. Its liberty of contract.

The discussion thereof is grouped into four sub-divisions, as follows:

(*a*) Umpires and Operators Committees (pp. 74-90).

(1) Assuming the Commission had authority to appoint Collins and Bradford Umpires, nevertheless, the Commission had no authority to delegate to Collins and Bradford, or to either of them and the Operators' Committee, any jurisdiction of a discretionary nature, and all the rules and regulations undertaking to vest any powers in Collins and Bradford other than purely clerical and ministerial are void, and consequently the Commission's rules vesting Collins and Bradford with jurisdiction over gauges and the amount of oil to be run by any

vest any powers in Collins and Bradford other than purely clerical and ministerial are void, and consequently the Commission's rules vesting Collins and Bradford with jurisdiction over gauges and the amount of oil to be run by any operator are void because they involve the exercise of judgment and discretion (pp. 74-80).

(2) The Legislature had no power to delegate authority to the Commission to create the office of Umpire and prescribe the qualifications and duties thereof and arrange for his salary, and if Section 5 of the Curtailment Act is construed to vest that authority in the Commission, it is void under Section 1 of Article 4 and Section 1 of Article 5 of the Oklahoma Constitution, questions neither raised, discussed nor passed upon by the Oklahoma Supreme Court in the Julian decision (pp. 80-81).

(3) The payment of salaries by the Operators' Committee to Collins and Bradford is against public policy, and vitiated all their alleged official acts (pp. 81-90).

(*b*) Gauges (pp. 90-106).

(1) That without Section 5 requiring the Commission to gauge each well, Section 4, purporting to authorize proportionate taking, would be void under the Fourteenth Amendment to the National Constitution in that it would delegate to the Commission an uncontrollable discretion and arbitrary power over all oil operators in the State—a power unlimited by any provisions of the statute and unascertainable by any oil operator (pp. 95-101).

(2) That a gauge made in accordance with the rules of the Commission permitting the operator to gauge his own wells in presence of a representative of an adjoining operator, although agreed to by a majority of the Operators' Committee or the Umpire, is void in that private parties are permitted to determine the basis (potential production) for the proration of production and consequently markets in which all operators are interested. That no such power and authority can be delegated to private persons is clear (pp. 101-104).

(3) That gauges made under the supervision of Collins and Bradford are illegal and void because their appointment as Umpires was against public policy. They never subscribed to any oath of office. The proration orders and regulations are all permeated with this inseparable, fatal vice. No one should be coerced under threatened penalties to recognize such gauges (pp. 104-105).

(4) The plaintiff and other operators were entitled to have gauges made under the supervision of a State officer, an officer who had subscribed to the oath required by the Constitution and was free to discharge his official duties without fear of alienating the affections of operators paying his salary and expenses (pp. 105-106).

(*c*) Price Fixing (pp. 106-113).

(1) The Commission has administered the law for the purpose of controlling prices of crude oil without regard to waste. The Commission has not at any time undertaken to protect the co-equal rights of the surface owners except during such periods as overproduction was threatening price structure (pp. 106-110).

(2) The Commission has never undertaken to do more than to make a mere estimate of the potential production of the Oklahoma City field and on that estimate, which concededly was greatly exaggerated, undertook to allocate markets (pp. 110-113).

(*d*) Conservation (pp. 113-123).

Third: **Interstate Commerce** (pp. 123-132).
The Rules and Regulations of the Commission are void in that they interfere with and constitute a burden upon interstate commerce.

Fourth: **Anti Trust Laws** (pp. 133-143).

(1) The Commission's rules and regulations limiting production are in excess of the Commission's powers, and void because the Commission has no authority to accept or assume the functions of a committee or association for the purpose of fixing prices or lessening "the production or sale of any product or article of commerce, or the use or consumption of the same or to prevent, restrict, limit or diminish the manufacture or output of any such article of commerce, use or consumption" (p. 133).

(2) The Commission had no power to interpose itself as a shield between the operators and purchasers on the one side and the Anti-Trust laws on the other—the Commission had no power to legitimate any such agreement or conspiracy by adopting it and making it what appeared to be its own (pp. 134-143).

wasteful use of gas pressure in lifting the oil.

* * * *

"Under these circumstances we are of the opinion that the limiting of the taking to the market demands is a reasonable regulation for the prevention of *waste* and the protection of the co-equal rights of the owners of land over such pool" (Rec., vol. I, pt. 2, p. 226).

## Assignment of Error.

For errors relied upon by appellant in No. 485, see Appendix B, pages 152-160.

## Legal Points Preliminary to Main Questions.

Before considering the constitutionality of the Act and the validity of the Commission's Rules and Orders plaintiff deems it appropriate that certain preliminary points set forth in Appendix "D", pages 164-176, should be considered by the Court.

## ARGUMENT.

In support of its contention that the Curtailment Act, in so far as it authorizes the Commission to close producing wells or restriot and limit the amount of oil that may be produced therefrom, to a pre-determined market outlet, is the taking of private property without due process of law, denies the equal protection of the laws, and denies plaintiff's liberty of contract in violation of the 14th Amendment to the National Constitution, plaintiff submits the following:

**(a) The business of producing and marketing crude oil is not a public service business, nor does the producer devote his property to a public use.**

*Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 67 L. Ed. 1103, 27 A. L. R. 1280.

*Tyson & Bro.* v. *Banton,* 273 U. S. 430, 71 L. Ed. 722.

*Williams* v. *Standard Oil Co.,* 278 U. S., 239-240.

**(b) The land owner or his lessee has a vested property right to drill wells on his land, penetrate the underground reservoir, and take all the NATURAL flow of oil and gas therefrom so long as he does so without physical waste and devotes the production to useful purposes.**

(NOTE: See Assignment of Errors, 3 and 4, R., vol. I, pt. 2, p. 380.)

*Or, said another way:* As construed by the Commission and the court below as vesting power in the Commission to limit the plaintiff's production to such an amount of oil "as the production of" its "well or wells" bears "to the total production of such common source of supply" because "the full production from" the "common source of supply of such crude oil or petroleum" will exceed "transportation or marketing facilities or reasonable market demands" (Sec. 3 of the Act) is a taking of plaintiff's property without due process of law in that it compels plaintiff to forego the use of the most valuable right incident to its ownership of land or leases and *forces it to purchase crude oil from other producers to meet its refinery needs.* (See 4th Assignment of Errors.)

Section 8395, Okla. C. St. 1921 (in force since statehood), defines real property as (1) land, (2) that which is affixed to land, (3) *that which is incidental or appurtenant to land,* and (4) that which is immovable by law.

Section 5250, Okla. C. St. 1921, provides that, "The words 'land', 'real estate' and 'premises', when used herein or in any instrument relating to real property, are synonyms and shall be deemed to mean the same thing, and, unless otherwise qualified, to include lands, tenements and hereditaments; and the word 'appurtenances' unless otherwise qualified shall mean all improvements and *every right of whatever* character pertaining to the premises described".

Section 3560, Okla. C. St. 1921, in force since statehood, declares that "the words 'real property' are coextensive with lands, tenements and hereditaments."

The statutes of Indiana and Rhode Island define *land* in almost the same language contained in the Oklahoma statutes. In *Potter* v. *Arnold*, 15 R. I. 350, 5 Atl. 379, and *Hyatt* v. *Vincennes National Bank*, 113 U. S. 408, 28 L. Ed. 1009, the courts held that the Rhode Island and Indiana statutes defining real estate include *incorporeal hereditaments.*

Neither the land owners nor their lessees in a given oil field have title to the oil and gas in place, and no title is acquired to the oil and gas until reduced to possession by extracting the same from the earth. But each land owner and his lessee has the right to drill wells on his land into the underground pool and take therefrom all the oil and gas he can get so long as he does not waste it. If he devotes it to a useful purpose his right to take is not confined to the particular oil that may be under his land at any given date. His right extends to the taking of any oil he can find under his land without regard to where it comes from. All offset wells draw oil from adjoining lands as well as the land upon which they are located. This has long been the established rule of property in Oklahoma.

In *Kolachny* v. *Galbreath*, 26 Okla. 772 (decided July 12, 1910), the Court said:

> "Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such a part as the grantee may find, and passes nothing that can be the subject of an ejectment or other real action."

See, also:

*Rich* v. *Doneghey*, 71 Okla. 204, 3 A. L. R. 352;
*Frank Oil Co.* v. *Belleview Gas & Oil Co.*, 29 Okla. 719;
*Priddy* v. *Thompson*, 204 Fed. 955 (Okla.), 8th Cir. Apps.;
*Alexander* v. *King*, 46 Fed. (2d) 235, 10th Cir. Apps. (Okla.).

Judge McDermott in *Alexander* v. *King, supra*, said:

> "The leading Oklahoma case is that of *Rich* v. *Doneghey*, 71 Okla. 204, 177 P. 86, 89, 3 A. L. R. 352, in which the Supreme Court of Oklahoma defined the rights of landowners to oil and gas underneath their land." * * *
>
> "Turning then to the rights granted under a lease similar to the ones here involved, the Court said:
>
> "'In other words, it was a grant of the exclusive right, for the time specified, *to take all the oil and gas that could be found by drilling wells upon the particular tract of land*, with the accompanying incidental right to occupy so much of the surface as required to do those things necessary to the discovery of and for the enjoyment of the principal right so to take oil or gas.'" (Italics ours.)

There is no method known to science by which the oil under a given tract of land can be segregated to that tract in the natural reservoir.

Oil and gas do not belong to the State. So long as wild animals remain in the State they are owned by the State for the benefit of all the people (*LaCoste* v. *De-*

*partment of Conservation,* 263 U. S. 545) subject to the Treaty making powers of the National Government (*Missouri* v. *Holland,* 252 U. S. 416). That the lessee has the right to take oil out of the ground so long as it is devoted to a useful purpose without waste was clearly announced by this Court in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 209. Mr. Chief Justice White said:

> "The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to *reduce a portion of the public property* to the domain of private ownership by reducing them to possession. In the *case of natural gas and oil no such right exists in the public.* It is vested *only in the owners in fee of the surface* of the earth within the area of the gas field. This difference points at once to the *distinction between the power* which the lawmaker may exercise as to the two. In the one, *as the public are the owners,* every one may be absolutely prevented from seeking to reduce to possession. No devesting of private property under such a condition can be conceived, unless the *public are the owners,* and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer* v. *Connecticut,* 161 U. S. 519, 525, 40 L. Ed. 793, 795, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. *They could not be absolutely* deprived of this right which belongs to them without a *taking of private property.*"

This statement of the constitutional rights of the landowners was forcefully reiterated by the Court in

*West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 252, 253, 55 L. Ed. 716. In that case, Mr. Justice McKenna referring to the Ohio Oil Company case, quoted the above language, and said the Indiana statute was upheld because its purpose was to prevent waste. Mr. Justice McKenna said:

> *"We said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it when in possession."*

The Curtailment Act does not undertake to communize the oil fields because it does not require that each operator shall have the same number of barrels out of the so-called common pool. One operator may bring in a 28,000-barrel well, whereas another operator may bring in a 2,800-barrel well within a radius of a few hundred feet of the 28,000-barrel well (See R., vol. II, pt. 3, pp. 302-302A).

The underground stratum penetrated by the 28,000-barrel well is a valuable appurtenance to the land over, around and above it and inheres in the title to the land itself as much so as the fertility of the soil. The drawing and producing capacity of that underground area into which the 28,000-barrel well penetrated cannot be constitutionally partitioned among the adjacent land owners so as to take away from the 28,000-barrel well a part of its producing capacity to be transferred to the

2,800-barrel well so as to increase its producing capacity.

Neither the Act nor the rules and regulations require the discoverer of the first well to close his well until the other land owners can drill into the so-called common pool and each get a number of barrels equivalent to the production of the discovery well. The Curtailment Act undertakes to prohibit the natural flow of the wells and this is what we say the Legislature cannot do, so long as the producer is not *wasting* the oil but is devoting it to a useful purpose.

Plaintiff had a legal property right to drill a well on its land covered by its lease and take all the *natural* flow of oil therefrom without regard to whether the oil recovered was drawn from under the land of its neighbors. Its neighbors have no vested right in the oil and gas in place in their lands. Neither has the plaintiff a vested right in the oil and gas beneath its lands. But the plaintiff has the legal property right to drill wells and take—without waste—all the natural flow of the oil without regard to its source, and we have found no adjudicated case to the contrary unless the *Julian Opinion*, 145 Okla., 237, 292 Pac., 841, can be so construed, which we deny.

In support of the foregoing principles, see:

*Barnard* v. *Monongahela Natural Gas Co.*, 216 Pa. 362, 65 Atl. 801;

*People's Gas Co.* v. *Tyner*, 131 Ind. 277, 31 Am. St. Rep., 433;

*Kelley* v. *Ohio Oil Co.*, 57 Ohio St., 317; 63 Am. St. Rep., 721;

*Letts v. Kessler*, 54 Ohio St. 73;
*Higgins Oil & Fuel Co.* v. *Guaranty Oil Co.*, 145 La. 233, 82 So. 206, 5 A. L. R. 411 (to which particular attention is invited. See Appendix E, page 194).
*Louisiana Gas & Fuel Co.* v. *White Bros.*, 157 La. 728, 103 So. 23;
*Calor Oil & Gas Co.* v. *Franzell*, 128 Ky. 715, 109 S. W. 328;
*Jones* v. *Forest Oil Co.*, 194 Pa. 379, 48 L. R. A. 748;
*Peterson* v. *Grayce Oil Co.*, 37 S. W. (2d) 367;
*Summers on Oil and Gas*, p. 72, and 74;
*Thornton on Oil & Gas*, 3rd Ed. vol. 1, Secs. 32, 33.
(See Appendix E, pp. 177-192, for quotations from above cases.)

Summers, in his recent work on Oil and Gas, published in 1927, discusses this right of the land owner to take the natural flow of oil without regard to its source—whether from under his land or his adjoining neighbor's land. After an elaborate citation of authorities and analysis thereof he says (p. 72) "When analyzed, it means that every landowner is privileged to take oil and gas from his land by operations thereon, regardless from whence it comes, and that his neighbors have like privileges to so act on their lands."

Also, the same authority, on page 74, says:

> "It has been held that the landowner may 'shoot' his gas well, to thereby increase the flow, without violating the rights of neighboring

owners. But in some cases it is held that the pumping of natural gas may be restrained, if the effect is to injure the common reservoir from which it is drawn. *The limitation in these cases is not upon the amount taken, but the manner of taking.*

"The rule of law is thus firmly established by an unbroken chain of dicta and decision, that A as the owner of Blackacre is legally privileged to drill wells for oil or gas upon his own land at any spot he may select, and to produce oil and gas therefrom, although a part of the oil or gas so produced is taken from B's land, Whiteacre, an adjoining or nearby tract."

It is therefore plaintiff's contention that the Oklahoma Legislature, in February, 1915, more than 7 years after Statehood, had no power to divest the owners of land in Oklahoma and/or their lessees of the property right to drill wells upon their land for oil, tap the underground reservoir, and take therefrom all the natural flow of oil from the wells so long as the producer did not pour the oil on the ground or otherwise waste it. So long as the producer devotes the oil to a useful purpose his right to take and appropriate the natural flow through his own wells can not be arrested by the Legislature or by the Commission under authority of the Legislature for the purpose of enabling an adjacent land owner either to find capital with which to develop his property or a market in which to dispose of his oil. This question is very different from the statutes involved in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, prohibiting "a contractor, owner, lessee, agent, or manager" from allowing or

permitting "the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle," etc., and different from the statute involved in the Natural Carbonic Gas case, 220 U. S. 61, sustaining the constitutionality of a New York statute entitled "An Act for the protection of the natural mineral springs of the state, and to prevent waste and impairment of its natural mineral waters," prohibiting "pumping, or otherwise drawing by artificial appliance, from any well made by boring or drilling into the rock, that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing, an unnatural flow of carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, *for the purpose of* extracting, collecting, compressing, liquifying, or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated."

In the Indiana Legislative Act sustained in *Ohio Oil Co.* v. *Indiana,* supra, the production of oil was not restrained or prohibited but regulated in order to protect the *gas from waste,* whereas, the New York statute involved in the *Natural Carbonic Gas Company case, supra,* prohibited "extracting, collecting, compressing, liquifying, or vending such gas" in order to protect the mineral waters from waste.

In the *Midland Carbon Company* case, 254 U. S. 300, the statute prohibiting "the use, consumption or burn-

ing of natural gas taken or drawn from any natural gas well or wells" without utilizing the heat units, was sustained on the ground that the Act prohibited actual physical waste.

No statute prohibiting the production of oil or gas for a useful purpose, without physical waste, to the capacity of the natural flow of the wells with due regard to preventing waste of gas in favor of oil or of oil in favor of gas has been sustained by any court.

May the Legislature vest in any official commission authority to promulgate rules (admittedly based on over-production) regulating the private business of producing oil and gas to the extent of compelling the retention of the oil and gas in the natural reservoir until the Commission later finds from such evidence as may be before it, that all the producers in a given territory are provided with, or have found ample transportation facilities, satisfactory marketing facilities, etc., accompanied by a pre-determined "reasonable market outlet"? Or, said another way: Admittedly plaintiff's control of pipe line facilities for its own production, the ownership of a refinery and markets through its filling stations in Oklahoma and several states, gives it an advantage over the producers in the same oil pool without these transportation and marketing facilities for any period during which the pool as a whole is capable of producing more oil than can be sold and transported out of the pool at prices satisfactory to the majority of the producers. But this advantage lies in the acquisition of its markets which involved the expenditure of capital vastly in

excess of the non-integrated producer's investment and thus entailing a correspondingly greater hazard. *Does this advantage acquired by the hazard of large capital investment fall within the protection of the 14th Amendment to the National Constitution or is it subject to confiscation without compensation under the police power of the state?* If a one-legged man enters a Marathon race must each of his competitors withdraw from the race or cut off a leg in order to share his handicap? If an oil lessee is without capital to develop his lease can the Legislature prevent his adjacent lessee with capital from drilling for oil until the other can find the money to also operate? The bankrupt lessee has the same argument to put forward as here, in substance, by the defendants, to-wit, that it would be unfair and inequitable to let one with finances penetrate the oil-bearing sand and remove the oil—without waste—while he, the bankrupt, had *not* the means to explore his property.

Judge Kennamer's dissenting opinion tersely sizes up this question as follows:

> "I cannot subscribe to the conclusion that the owners of land in a common oil pool own such oil and gas in common, and the right of one owner to reduce oil and gas underlying the surface of his land to possession is dependent upon the ability of another owner to reduce the oil and gas beneath the surface of his land to possession. No such rule of property exists in the State of Oklahoma.
>
> "The right of an owner of land within Oklahoma to drill wells and reduce oil and gas to pos-

session which lies beneath his land is a property right protected by the Fourteenth Amendment to the Federal Constitution. The Oklahoma Supreme Court has repeatedly followed the rule that an estate in fee simple in lands in Oklahoma includes all oil and gas in place in and under the land so long as it remains therein, and the owner of such land has a vested right to use it and to enjoy the profits accruing therefrom, since without the latter the former cannot be of value. *Wright* v. *Carter Oil Co.*, 97 Okla. 46, 223 Pac. 835; *Green* v. *Biddle*, 8 Wheat. 1-76, 5 L. Ed. 566; *Terrace* v. *Thompson*, 263 U. S. 215, 44 S. Ct. 15, 68 L. Ed. 274. * * *

"It is the contention of counsel for the defendants that if the amount of oil to be produced is not restricted under the proration orders of the commission it will result in waste through storage of crude oil, especially storage in earthen tanks. Aside from a rule prohibiting storage in earthen tanks, the commission has in no manner undertaken to regulate the storage of crude oil. It is a matter of common knowledge that millions of barrels of crude oil are now confined in storage. If the Legislature deems storage of oil in earthen tanks wasteful, and there is no evidence that such practice has been engaged in, during recent years, it can pass a brief act prohibiting such storage. The evidence is uncontroverted that the complainant in this case has been and is capable of producing, refining, and marketing its products without waste."

We submit that this case falls within the principle announced and applied in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322, 28 A. L. R. 1321,

in which this court held unconstitutional an act of the Pennsylvania legislature forbidding the mining of coal in such a way as to cause the subsidence of any structure used as a human habitation, etc. Mr. Justice Holmes quoted a Pennsylvania decision saying "For practical purposes the right to coal consists in the right to mine it." Mr. Justice Holmes further said:

> "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does."

In *Buchanan* v. *Warley*, 245 U. S. 74-75, 62 L. Ed. 161, this court said:

> "The Fourteenth Amendment protects life, liberty and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, *use and dispose of it*. The Constitution protects these essential attributes of property. *Holden* v. *Hardy*, 169 U. S. 366, 391, 42 L. Ed. 780, 790, 18 Sup. Ct. Rep. 383."

In *Lawton* v. *Steele*, 152 U. S. 133-144, 38 L. Ed. 385, 388, this court said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, *first*, that the interests of the *public generally*, as distinguished from those of a particular class, re-

quire such interference; and, *second*, that the means are reasonably necessary for the accomplishment of the purpose, *and not unduly oppressive upon individuals.* The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

Although police power "is an attribute of sovereignty," is "inherent in the States," and antedates the Constitution, it is not superior to the Fourteenth Amendment. Nevertheless, it is a dangerous enemy of constitutional rights and unless confined to its proper limitations will sooner or later destroy the last *remnant* of constitutional government.

**(c) Assuming the Legislature, in the exercise of the police power, may limit or restrain the production of oil for useful purposes without actual physical waste and authorize the Commission to make rules and regulations for its enforcement, nevertheless, Section 2 of the Act, authorizing the Commission to ascertain "the actual value of such crude oil or petroleum", record its findings and "publish the same in some newspaper of general circulation in the State", and prohibiting the "taking of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such**

**crude oil or petroleum", is a price-fixing law and void under the 14th Amendment to the National Constitution. (See 5th Assignment of Error.)**

*Williams* v. *Standard Oil Co.*, 278 U. S. 239, 73 L. Ed. 308;

*Tyson & Bro.* v. *Banton*, 273 U. S. 418-429, 71 L. Ed. 718-722;

*Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 67 L. Ed. 1103;

*Fairmont Creamery Co.* v. *State of Minnesota*, 274 U. S. 1, 71 L. Ed. 893;

*Ribnik* v. *McBride*, 277 U. S. 350, 72 L. Ed. 913.

It clearly deprives the producer of his liberty of contract, his right to negotiate his own price without regard to the price his adjacent producers are willing to take for their oil coming from the same field.

In *Allgeyer* v. *State*, 165 U. S. 578-589, 41 L. Ed. 832-835, this court said:

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, • • • but the term is deemed to embrace the right of the citizen • • • to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to *enter into all contracts* which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

The last paragraph of the Commission's order of February 18th, 1916 (R. vol. 2, pt. 3, p. 269), says,

"Without going into all the details of the evidence with reference to the relative value of the Healdton oil with other oils, we are of the opinion that the fixing of a price of crude oil under Sec. 2 of this Act is absolutely impossible and impracticable. The complaint is therefore dismissed."

In the last paragraph of the majority opinion in *Julian Oil and Royalties Co.* v. *Capshaw,* 145 Okla. 243, it is said that Section 2 of the Act "is not involved in this action, and it is not to be assumed that if the Corporation Commission were attempting to fix the market value of oil under that section, we would sustain same; but we do hold that the Act as a *whole* provides a valid method of preventing waste of the oil of this State; that the same is a proper exercise of the police power of the State; and that plaintiff has not been deprived of any of its constitutional rights."

As will appear in the next sub-section, we contend that the Act as a whole, and as administered by the Commission, did intend to fix prices by limiting production and did so in fact.

**(d) Section 2 of the Act—the section expressly conferring price-fixing powers on the Commission—is an inseparable part of the statute, being the very keystone of the whole legislative arch, and therefore either renders the entire act void under the 14th Amendment or furnishes such key to the meaning and effect thereof as to render the entire Act void. (See 5th Assignment of Error R. vol. 1, Pt. 2, p. 381.)**

By Sections 2, 3, and 4, the Legislature intended to authorize the Commission to control the price of crude oil.

In *Smith* v. *St. Louis & S. W. R. Co.*, 181 U. S. 248-257, this court said "Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained," and in *Lochner* v. *New York*, 198 U. S. 45-64, this court said, "The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose."

In *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 709, Mr. Chief Justice Hughes said:

> "• • • it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect."

Section 10 of the Act, declaring "that the invalidity of any section, subdivision, clause or sentence of this act shall not in any manner effect the validity of the remaining portion thereof," provides, as said by Mr. Justice Brandeis in *Dorchy* v. *Kansas*, 264 U. S. 286, "a rule of construction which may sometimes aid in determining that intent" but "it is an aid merely; *not an inexorable command.*"

The Act is inseparable under the rule announced in the following cases:

*Dies* v. *Bank of Commerce*, 100 Okla. 205;
*Parwal Inv. Co.* v. *State*, 71 Okla. 122;

*Williams* v. *Standard Oil Co.*, 278 U. S. 239, 73 L. Ed. 308;
*Hill* v. *Wallace*, 259 U. S. 44-75, 66 L. Ed. 823.

As said in *Williams* v. *Standard Oil Company, supra,* (p. 243) Sections 3, 4, and 5, "*are mere adjuncts of the price-fixing provisions of the law, or mere aids to their effective execution.*"

Without Section 2, Section 3 is void for uncertainty in that "economic waste * * * and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands" clearly refers to Section 2 prohibiting the "taking of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum," as determined by the Commission under its authority conferred by the Act. The prevention of actual physical waste is one thing the ordinary man may understand, but "economic waste * * * and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands" means entirely something else. The Act prescribes no standard by which an operator can govern himself and it is clear that when the Legislature, by Section 3, prohibited "economic waste * * * and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands" it had in mind the production of oil "when (using the language of Section 2) there is not

a market demand therefor at the well at a price equivalent to the actual value" as fixed by the Commission. Sections 2, 3 and 4 are inseparably united and must be construed together as a unit, otherwise Section 3 is void for uncertainty in that neither the statute nor the facts define "economic waste, underground waste, * * * and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands."

"Reasonable market demand"—what does it mean? Obviously these three important words cover two things, to-wit: (*a*) "reasonable market" and (*b*) "reasonable demand." *"Reasonable demand"* as therein used has to do with quantity, whereas *"reasonable-market"* has to do with *price.*

That which constitutes economic waste is a political question or business question about which many may differ. In order for plaintiff to obtain out of the Oklahoma City field, under proration, its refinery needs, it would be compelled to drill anywhere from 40 to 50 wells at a cost of many millions of dollars as it would not be allowed to take from each well more than 6 per cent of its capacity under one method of arriving at potentials adopted by the Commission and less than 3 per cent under another method of the Commission for the identical purpose. The Indian Territory Illuminating Oil Company has 309 wells in the field (R., vol. II, pt. 1, pp. 19 to 24, inc.); the Phillips Petroleum Corporation has 46 wells in the field (R., vol. II, pt. 1, pp. 25-26); and Slick-Urschel has 88 (R., vol. II, pt. 1, pp. 28-29). This entails a tremendous *economic waste.*

Dr. Ralph Arnold, one of the greatest geologists and

petroleum engineers in the United States, for 6 years a member of the geological survey of the United States Government, organizing the Petroleum Division of the United States Bureau of Mines and Chairman of the advisory committee appointed by the California courts in connection with certain litigation in that state, testified that there was no method known to science for determining underground waste; that in operating a given well or drilling into a given sand one expert might prescribe the way to do so to get the greatest recovery and suffer the least waste underground, while another *set of experts* would say to operate in an entirely different manner (R., vol. 1, pt. 2, p. 332).

What constitutes "reasonable market demands" is inseparably connected with price as one might regard the demand reasonable at a price of 50 cents per barrel while another operator might regard anything less than $1.00 a barrel unreasonable. Therefore, unless Sections 3, 4 and 5 are construed together, Section 3 must fall for the want of certainty under the authorities cited on pages 98 and 99 of this brief. Construing them as a unit, the Legislature declared the production of oil in Oklahoma to be "economic waste" unless there was a "market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum" as determined by the Commission.

Section 4 does not become operative until "the full production from any common source of supply of crude oil or petroleum in this state can only be obtained under *conditions constituting waste, as herein defined,*" which clearly refers to the definition of waste in Section 2. The last sentence in Section 4 undertakes

to vest the Commission with power *"to prevent unreasonable discrimination in favor of any one such common source of supply as against another,"* which can not possibly refer to one oil pool draining another, as the evidence shows that even the Seminole field is composed of a series of structural fields incapable of draining each other and that wells in the Oklahoma City field can not possibly drain the Seminole field nor any of the other fields. The Oklahoma state fields are separated by distances from 40 to 95 miles (R., vol. 1, pt. 2, p. 260). Under well settled rules of statutory construction a statute will not be given an absurd interpretation. *U. S.* v. *Regan,* — U. S. —, decided Nov. 23, 1931. So the clause in Section 4 conferring authority upon the Commission "to prevent unreasonable discrimination in favor of any one such common source of supply as against another" must be construed as a power to shift markets from one field to another, which we think the evidence shows the Commission has been doing under the pretext of preventing waste.

Irrespective of the evidence "not what has been done under a statute, but what may reasonably be done under it is the test of its validity" as said by the New York Court of Appeals in *In re Richardson,* 247 N. Y. 401, 160 N. E. 655-661.

In our judgment the dissenting opinion on this point is unanswerable. Judge Kennamer said (R., vol. 1, pt. 2, p. 238):

> "With all deference to the opinion of my associates, I cannot escape the conclusion that Section 4 of the Act is no more nor less than a part

of the legislative scheme to fix prices for crude oil and that it does not provide for a fair and equitable proportionate taking by separate operators in the common pool. Section 4 does not purport to require equitable taking except 'Whenever the full production from any common source of supply * * * can only be obtained under conditions constituting waste, as herein defined,' which must mean that a person 'having the right to drill into and produce oil from any such common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom, without waste, as the production of the well or wells of any such person, firm or corporation, bears to the total production of such common source of supply,' whenever, quoting Section 2, 'there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum,' as determined by the Commission. Section 4 means that whenever there is not a market at the price fixed by the Corporation Commission for 'the full production from any common source of supply of crude oil or petroleum in this state' then 'any person, firm or corporation having the right to drill into and produce oil from any such common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom' and sold 'at the well at a price equivalent to the actual value of such crude oil or petroleum' as determined by the Corporation Commission under the authority attempted to be conferred upon it by Section 2 of the Act. If this is not the correct construction and the Legislature in-

tended to authorize the Commission to enforce in the oil fields 'a just distribution, to arise from the enjoyment' by the operators in that field 'of their privilege to reduce to possession,' then why did not the Legislature prohibit an operator from pumping his wells unless his adjoining neighbor in the same pool has facilities for pumping oil from the common source (and an operator using a pump may restrain an adjoining operator from leaving open unproducing wells on his property the effect of which is to interfere with the action of the pump. *Higgins Oil & Fuel Co.* v. *Guaranty Oil Co.*, 145 La. 233, 82 So. 206, 5 A. L. R. 411 and note; *Bassel* v. *West Virginia Central Gas Co.*, 86 W. Va. 198, 103 S. E. 116, 12 A. L. R. 1398; *Thornton on Oil & Gas*, 3rd ed., vol. 1, sec. 32) and why did not the Legislature require an operator to shut down his offset wells in the event his adjoining neighbor's wells are choked up by drilling trouble or otherwise and thereby prevented from producing? The so-called proportionate taking as provided for by Section 4 only becomes operative in flush pools or in pools the full production of which can not find a market 'at the well at a price equivalent to the actual value of such crude oil or petroleum' as determined by the Corporation Commission. No provision is made prohibiting an operator from shooting his wells (*Thornton on Oil & Gas*, 3rd ed., vol. 1, sec. 33) and thereby artificially increasing the production of oil therefrom, although his neighbor may not be able to shoot his wells. It is clear to my mind that Section 4 is nothing more than a mere mask behind which to disguise the price fixing features of the statute.

Section 4 clearly contemplates markets and not an equal distribution of the oil in a common pool. If 'a just distribution, to arise from the enjoyment * * * of their privilege to reduce to possession,' using the language of the Ohio Oil Company case, was the purpose of Section 4 of the Act, it is strange it did not provide for taking into consideration acreage in figuring out the proportionate taking. Yet Section 4 says that an operator can take out 'only such proportion of all crude oil and petroleum that may be produced therefrom, without waste, as the production of the well or wells of any such person, firm or corporation, bears to the total production of such common source of supply.' Acreage is ignored and an operator with two 5,000 barrel wells on 5 acres may take out of the common source of supply, under the provisions of Section 4, as much oil as an operator with two 5,000 barrel wells on 20 acres in the same field. Proportionate taking per well is wholly inequitable if the Legislature intends to secure 'a just distribution, to arise from the enjoyment * * * of their privilege, to reduce to possession' because the operator with 20 acres *has four times as much privilege as the operator with 5 acres in the same field.* As further evidence that Section 4 is concerned with markets and not with proportionate taking, the Commission is authorized 'to prevent unreasonable discrimination in favor of any one such common source of supply as against another,' which must mean that the Commission is authorized to prorate markets because we can not attribute to the Legislature the absurdity involved in an authorization to the Commission

to prohibit, for instance, the Oklahoma City field from draining the Seminole field or the Tonkawa field, separated by many miles and shown by the undisputed evidence to be incapable of draining any other field.

"Severing Section 2 from the Act and declaring or conceding its unconstitutionality does not take it out of the Act when we come to ascertain the legislative intent. An unconstitutional law or part of a law may be considered in order to ascertain the intent of the Legislature in another law or a part of the same law. *Lewis' Sutherland Statutory Construction,* 2nd ed., vol. 2, sec. 452.

"The Illinois Supreme Court in *Baird* v. *Hutchinson,* 179 Ill. 435, 53 N. E. 567, said, 'The meaning of the Legislature must be gathered from all they have said, as well from that which is ineffective from want of power, as from that which is authorized by law.'

"Mr. Justice Van Devanter, in *Davis v. Wallace,* 257 U. S. 478, 66 L. Ed. 325, 42 S. C. 164, applied this rule and said that:

" 'Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain.'

"The Court in that case also held that declaring a section of a statute unconstitutional 'does not make the provisions any the less a key to the intention of the legislature.'

"Section 2 permeates the whole statute. It is the foundation of the statute and without it Sections 3 and 4 are too vague and uncertain to vest any power in the Corporation Commission to make the rules and regulations assailed in this

case. *The Act nowhere undertakes to vest the Corporation Commission with power to define waste.* See *Hewitt* v. *Board of Medical Examiners,* 148 Cal. 590, 84 Pac. 39; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 71 Law Ed. 1146.

"As shown by the Commission's various orders from June 30th, 1930, down to date, it has purported to find a market demand for the entire State of Oklahoma, and then no doubt acting under the last clause in Section 4 of the Act, allocated those markets between various fields, a thing I do not believe the Legislature can constitutionally authorize, *as it in effect takes one man's market and gives it to another.* In the Commission's order of June 30th, 1930, it found that the existing wells in Oklahoma following the 1st day of July would produce approximately 1,362,000 barrels per day and 'That the daily demand in Oklahoma is and will be approximately 650,000 barrels per day during the months of July, August and September, 1930.' In the decretal part of the order it distributes this market among the various fields, naming them in a schedule setting forth their estimated potential and estimated actual production. This same scheme was followed in the succeeding orders. The Commission in finding that the market demand in Oklahoma for certain months was a certain number of barrels evidently meant a market at the posted price, the then existing price, and not a market at a lower price. It is true that there may not be a market for more than 650,000 barrels per day at $1.07 a barrel, whereas, there may be a market for one million barrels per day at 75 cents per barrel.

"Collins, umpire for the state at large, testified that although he did not make recommenda-

tions upon which the Commission assigned market demand in the Oklahoma City field for the month of January, 1931, he did make recommendations for the Seminole and the balance of the state, and that although he had nothing to do with assigning market demands to the respective fields he made recommendations to the Commission. On re-examination Collins testified that he tried to get an increase of the market demand for the Oklahoma City field but that in doing so he never considered the price; that he never tried to get a market at a price below the posted price because it would be nearly impossible to find a seller, and that he had *never considered it his business to try to get any market below the market price,* all of which goes to show that the Commission's so-called findings of market demands were based on a finding of the ability to sell at the then posted price and not at a lower price." (Italics ours.)

(NOTE: For Collins' testimony referred to by Judge Kennamer, see R., vol. 1, pt. 2, p. 294.)

In his dissenting opinion Judge Kennamer cuts through form and penetrates the very body and soul of the Act in the following unanswerable reasoning (R., vol. 1, pt. 2, p. 243) to wit:

"In view of the fact that the Oklahoma Act does not (*a*) take into consideration acreage, or (*b*) prohibit the use of pumps to create an excessive flow of oil, or (*c*) closing offset well or wells when a stoppage of an adjoining operator's well is caused by losing the casing or other accident, or (*d*) make any provisions for equitable taking except 'where the full production from any com-

mon source of supply of crude oil or petroleum * * * can only be obtained under conditions constituting waste,' which must mean where there is not a sufficient market at a fixed price for all the oil, I conclude that the Act and the orders of the Commission made in pursuance thereof were intended to accomplish one result and that is price fixing by regulating the law of supply and demand by statute and rules of the Commission."

**(e) Even if Section 2 of the Act is wholly disregarded as unconstitutional then the remaining portions of the Act are too uncertain and indefinite to confer upon the Commission the power and authority it seeks to exercise through its rules and regulations, in that the Act does not define economic waste or waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands, and does not confer authority upon the Commission to define such waste, and if it does confer such authority then it is void because in violation of Section 1 of Article 4 of the State Constitution dividing the powers of government into three separate departments, and Section 1 of Article 5 of the State Constitution vesting the legislative power in the Legislature.**

(NOTE: See 2nd Assignment of Errors, R., vol. 1, pt. 2, p. 380.)

*Hewitt* v. *Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39;

*Ex Parte Peppers*, 186 Cal. 682, 209 Pac. 896;

*Patten* v. *Aluminum Castings Co.*, 135 Ohio St. 1, 136 N. E. 426;

*Smith* v. *Cahoon*, Sheriff, 283 U. S. 553;
*Connally* v. *General Construction Co.*, 269 U. S. 385;
*United States* v. *Capitol Traction Co.*, 19 Ann. Cas. 68;
*Cline* v. *Frink Dairy Co.*, 274 U. S. 457;
*United States* v. *L. Cohen Gro. Co.*, 255 U. S. 81;
*Weeds* v. *United States*, 255 U. S. 109;
*International Harvester Co.* v. *Kentucky*, 234 U. S. 216;
*Collins* v. *Kentucky*, 234 U. S. 634;
*Atlantic Refining Co.* v. *Trumbull*, Governor, 43 Fed. (2d) 154;
*Chicago & Northwestern Ry. Co.* v. *Railroad Commission*, 280 Fed. 398;
*City of St. Paul* v. *Schleh*, 101 Minn. 425, 112 N. W. 532;
*Wasem* v. *City of Fargo*, 49 N. D. 168, 190 N. W. 546;
*Ex parte Jackson*, 45 Ark. 158;
*The Schooner Enterprise*, 1 Paine (C. C.) 32.

Although the highest state court having jurisdiction (*State* v. *Tibbetts*, 21 Okla. Crim. 168, 205 Pac. 776) had sustained the constitutionality of the Act there involved as sufficiently definite, this court, in *Connally* v. *General Construction Co.*, 269 U. S. 385, refused to follow the state court decision and held the Act void for uncertainty.

*Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532, 48 L. Ed. 779.
*Burgess* v. *Seligman*, 107 U. S. 20, 27 L. Ed. 359.

**(f) Assuming that Section 2 of the Act is severable, the Act is nevertheless unconstitutional for the reason that Section 3 thereof is plainly for the purpose and has the necessary effect of authorizing an agency of the State to control prices for the benefit of a particular class,—the oil producers.**

Section 3 accomplishes this result by authorizing the curtailment of production to that "market demand" which the Commission shall find to be "reasonable."

There are only three factors in any market: (*a*) supply, (*b*) demand, and (*c*) price.

All are interdependent, and the control of the first two of these factors, necessarily means control of the price.

In other words, the market demand at one price will be different from the market demand at another price. For example, when a field is first discovered and produces only a few thousand barrels per day, the price remains stationary. If its production should mount to 200,000 barrels per day, the competition between sellers becomes keener and the price drops. If the production mounts to 400,000 barrels per day, competition becomes still keener and the price drops still further, and if production mounts to 600,000 or 700,000 barrels per day, the price must drop again to attract buyers for the commodity. Every *production level* has its corresponding *price level* and any *agency which has the power to select the production level* must necessarily have as incident thereto, the power to select the corresponding price level.

It is clear also that when "reasonable market demand" is made the sole criterion with which to measure the extent of curtailment, the purpose thereof must be to keep a controlling hand upon the price level. This is not a situation where the supply is being incidentally affected. A State *agency* has deliberately set out to control those factors which control price. As the result thereof, the hand of this *agency* at the behest of the principal oil companies operating in the State, is firmly upon the valve which controls prices. A turn of the wheel in the direction of increased production would almost immediately result in lower prices, and conversely, a constant turning of the wheel in the direction of decreased production must necessarily mean a consequent increase in prices.

As an economic proposition it is clear that any agency which has control of the market demand and is empowered to limit production to what is determined to be market demand, thereby has effective, absolute and constant control over the price.

**(g) Even if proration of production, to meet market outlet, could be justified under the 14th Amendment, the basis of such proration in the instant case is clearly inequitable, and involves a taking without due process of law, and is a denial of the equal protection of the laws.**

In discussing this point we wish to *emphasize the fact* that we do not concede that any form of proration of production to market outlet can be justified. But if the Court does not sustain that point (which would dis-

pose of the case) we then respectfully contend that if proration is to be recognized as a State governmental right, that it must at least be based upon considerations of equity and even-handed justice.

The theory of proration to meet an insufficient market outlet necessarily presumes a proportionate right to such market. Such a conception is foreign to our jurisprudence, and that of the English speaking race. *There is no such thing as a right to a market.* The only right which anyone has to a market is that which is due to his skill, industry, foresight and capital, and that must be protected by the working of natural forces. The decisions of the English speaking world could be searched in vain for any recognition of a principle to the contrary, and it is this fact that makes the scheme of proration invalid *per se.*

But if proration is to be recognized in this case, there must be an equitable system invoked for the measurement of the relative equities which competing producers would have in a market which is *insufficient for all.* The method of proration in this case is to prorate production according to an assumed potential capacity to bring oil to the surface. Obviously the ability to bring oil to the surface is no reasonable measure of any assumed right to a proportionate share of the market, for such proportionate share must necessarily depend, if it be recognized at all, upon the facilities which each competitor has to find a market for his products.

It is easy to show the inevitable injustice to which the present scheme of proration would lead, and the illustrations we give are the facts in the instant case.

Take two competitors, one of whom has existing contracts for all his products, and the other without contracts whatsoever. The plaintiff in this case is in the first position, for it has an abundant use for all the crude oil that it can produce—without waste—and with its facilities has no difficulty in getting a market for all its production. The result is that having had the industry to create a market the plaintiff is now obliged to divide that market, or at least a portion of it, with those who either are without a market, or at least without an adequate market for their products. Moreover, the facts in this case show, as further illustrating the injustice of the situation, that plaintiff with an abundant capacity for production of crude oil in its wells, ample for the needs of its refinery, and with an ample market demand for its products, is actually obliged, in the practical working of these proration orders, to buy both crude oil and gasoline from the very competitors who, in the manner hereinbefore described, have imposed this unjust system upon it.

Plaintiff is the owner of oil wells (in the Oklahoma City field) with capacity to produce without physical waste (under the most rigid regulation) all the oil its refinery requires, to be in turn manufactured into gasoline and by-products, for sale to its trade—that is, to the market, built up over a long term of years by large investments in the refinery, marketing facilities, pipe lines, filling stations and wholesale distributing plants throughout Oklahoma and many other States. Said another way, plaintiff, by hazardous investment of large capital, has created for itself a market for all

the refined products its refinery is producing, and, to supply its refinery's needs, has invested large sums in oil leases. Crude oil in its natural state is practically without value, because there is no use for it until it is made possible of utilization by manufacture. When compelled to go on a proration basis, and close its producing wells to a ridiculously low percentage of capacity, its producing properties, under the Commission's orders, would not meet one-twentieth of its refinery demands.

To keep its refinery going, which is necessary to maintain its market, it is compelled to purchase crude oil from other producers known as *non-integrated* (as hereinafter more fully identified and classified) operators, and thus share with such non-integrated producer the plaintiff's markets without any compensation to the plaintiff therefor. In other words, proration confiscates a proportion of plaintiff's markets, for the benefit of competing producers.

It is obvious that mere production of crude oil from the depths of the earth to the surface does not measure the relative capacity of different producing competitors to find a market for their products. The production of oil is but an incident. Its chief use is in the manufacturing process of refining and selling *it* in the form of gasoline. As between different competitors there is a manifest difference in the ability of each to get a market, if the law left the matter to the natural forces of competition.

The broadest classification between different competitors in this respect is between the integrated and

non-integrated producer. The non-integrated producer brings his crude oil to the surface and expects to find (or have the state create) a market at the mouth of the well. His only facility for getting such a market is a *demand* by those who will purchase at the well. The integrated producer has far greater facilities for finding a market. When it brings oil to the surface and is without an immediate purchaser at the well, it may store such crude oil in tanks, or employ its pipe line for swift transportation to the markets of the industry, or may utilize its refinery in which it will convert such crude oil into gasoline and other by-products; or, having procured railroad tank cars with which to transport such crude oil, or the gasoline derived therefrom to distant markets where there will be an adequate demand; or may utilize its filling stations in which it can readily market to the consuming public the crude oil as changed into gasoline.

Is it not then a manifest injustice to level the integrated producer, who has invested millions in these facilities for the creation of a market, to the non-integrating producer, who has failed to provide such facilities. Prorating in proportion to the production of crude oil necessarily means the destruction, *pro tanto*, of all the superior facilities that the ability, foresight, business genius and capital of the integrated producer has so created.

For example: A well may be sunk and oil found at a cost of $150,000. The producer then has no more than the ability to sell his market *at the well.* He is without storage tanks against market demand, and

therefore is obliged to sell without delay, or stop the production of his oil. The integrated producer may have ten millions invested (not only in the mere sinking of wells) in the storage tanks, pipe lines, tank cars, refineries, filling stations, etc. Moreover, one man may have embarked in the business but yesterday, while another may have established by years of patient industry and frugal management, a good will which gives in return a full market, irrespective of the ability of the less fortunate producers to find a like market. All the right of superior industry and capital to the markets that have been thus earned are *nullified* by a purely artificial and arbitrarily unreasonable basis of proration.

It may be suggested by defendants that this Court will not consider whether one method (of curtailment) is wiser than another, but should leave that to the legislative discretion of the State. Such suggestion does not apply to methods, one of which is *unjust* and the other *just*. If it be clear that a more equitable recognition of these assumed rights to a proportionate part of the market means even-handed justice, and one method employed works a palpable and inevitable injustice, then this Court, under the benign provisions of the 14th Amendment, will insist that, whatever method may be adopted by the Legislature of the State, must be one based upon a broad consideration of relative equities.

If we be asked what different or other method of curtailment could be devised, we must answer that we need only show that the method *adopted* is

inherently unjust. However, we meet the challenge by suggesting that if the scheme of proration is to be recognized as a valid exercise of legislative power, in measuring relative rights to a market, such scheme must be based upon the consideration of capital investment in meeting the demands of the market. If, therefore, the Corporation Commission had valued the relative investments of different competitors in Oklahoma, and had said that each was entitled to a market in proportion to his capital investment in the facilities for meeting the market, something could be said for the fairness of thus apportioning markets, although its objectionable price fixing character would remain.

However, as before stated, we are not obliged to suggest another method of proration and can surely rest our case upon the broad proposition that the basis of proration, in the practical administration of this law, involves the signal injustice of putting the man who has risked large capital investments upon the same level with the man who invested small capital; one who has a long established good will upon the same level with the man who is without good will at all; one who has invested in all the facilities incident to the creation of a market on the same level with the man who is without facilities of any kind for the meeting of the market.

If this Court shall decide to cross so fateful a Rubicon as the recognition of any scheme to prorate markets, then at least the method of proration must not rob Peter to pay Paul.

## THE ORDERS (RULES AND REGULATIONS) OF THE CORPORATION COMMISSION ARE UNCONSTITUTIONAL.

### The Commission Has Administered the Act in an Unconstitutional Manner.

Looking through form to substance, this Court has always denied the right of any legislative or administrative agency to deprive any citizen of his property in order to give effect to enactments which (a) have for their purpose the aiding of a particular class, or (b) which adopt means not reasonably necessary to the accomplishment of any public purpose.

*Lawton* v. *Steele*, 152 U. S., 133; 38 L. Ed., 385.

In the case of *Dobbins* v. *Los Angeles*, 195 U. S. 235, 49 L. Ed. 175, this Court held unconstitutional an ordinance of the City of Los Angeles making it unlawful to erect a gas plant in a certain section of the city, on the ground that the extrinsic circumstances showed that said ordinance was not enacted in good faith as a zoning ordinance, but was enacted to prevent a plant from being built in competition with the company holding the gas monopoly.

As *corroborative* of the unlawful purpose of the rules and regulations herein complained of, we submit that the origin of the orders throws light upon their purpose. After the orders of 1914 hereinafter referred to (Appendix A, page 145), curtailment and proration were not attempted in Oklahoma until 1926, when the discovery of the Great Seminole field threat-

ened the price level of crude oil. At that time the large companies operating in the Seminole field entered into a voluntary agreement to curtail their production. Later this voluntary agreement was approved by the Corporation Commission, and as an outgrowth of these orders came the present orders of the Corporation Commission. As admitted by Mr. German, Counsel for Defendants (R., vol. I, pt. 2, p. 280):

> "In 1926 there was proration by agreement in the Seminole field; in 1927 proration by orders of the Corporation Commission, and it has been that way ever since except for some small intervening periods, and beginning in 1927 he (Ray Collins) was appointed by the Corporation Commission as Umpire.
>
> "Mr. Glasser: Is counsel testifying?
>
> "Cotteral, J.: He is making an admission.

The fact that the present proration was born in voluntary agreements is highly significant. When the wolf is in the sheep-fold, the farmer does not have to take evidence to determine his purpose there. Similarly, in these days of strenuous competition, when all corporations, including oil companies, are striving for profits, it does not require evidence to determine the purpose of a voluntary curtailment agreement. This is even more true in periods when overproduction is threatening price structure.

The Corporation Commission has ascertained and computed the "reasonable market demand" and "reasonable transportation facilities" to which it limited the production from the State, by merely receiving from the pipe line companies which had connections

in each field, the volume of crude oil which such pipe line companies "nominated" to run and purchase during the period fixed within each of said orders.

The Umpire, Mr. Collins, testified that when the proration system was inaugurated in the Seminole field, the committee of the operators who had agreed to the curtailment

> "petitioned that the Seminole pool be prorated to the *outlet.*" (R., vol. I, pt. 2, p. 282.)

that he had testified before the Corporation Commission that

> "he was not interested, as far as the public was concerned." (R., vol. I, pt. 2, p. 288.)

that in fixing the allowable run in the Seminole field

> "the purchasing companies in the Seminole area were asked to and did make their nominations as to *the amount they would take out* of those fields." (R., vol. I, pt. 2, p. 290.)

For the entire State the witness testified

> "that the recommendation which the witness takes to the Corporation Commission for the assignment of so-called market demand over the State, is predicated upon data and information which is obtained from these men at the heads of these pipe line companies; that since January 1st, 1931, all of the purchasing companies in the State are subpœnaed by the Corporation Commission to appear before the Corporation Commission and *the nominations* are there made directly to the Corporation Commission." (R., vol. I, pt. 2, p. 290.)

The witness testified further

> "that an effort to get a market below the posted price was never attempted because it would be practically impossible to find a seller; that the witness has never considered price in any way in attempting to get a market, but that he has never tried to get a market below market price." (R., vol. I, pt. 2, p. 294.)

also

> "the amount of the allowable production in each pool corresponded to the *current demand* for crude oil from such pool; and the same thing is true in the case of each of the orders." (R., vol I, pt. 2, p. 298.)

Speaking of the Oklahoma City field in its order No. 5413 of December 30, 1930, the Commission said:

> "* * * On the basis of the potential production of the field now reported to the Commission of 5,388,298 barrels per day, the temporarily *nominated* outlet of 85,000 barrels per day will require a proportional taking of 1½% from the potential production of each well or lease. * * *" (R., vol II, pt. 2, p. 178.)

All of the foregoing conclusively shows that the whole theory in fixing market demand was, that competition in the purchasing of oil should be eliminated and the *status quo* maintained.

No scientific investigation is made as to the amount which each well might produce (as within the California gas-oil ratio law), in the interest of the greatest possible recovery of oil with the least waste of gas energy.

The statement of the Commission in Order No. 5189 (R., vol. II, pt. 2, p. 93) to the effect that the arrangement "was agreed to" by all producers and purchasers (save one) is of the essence of the whole scheme.

Immediately following the *en banc* announcement by the Corporation Commission of March 4, 1931, that the allowable production from the Oklahoma City field should be raised from 125,000 barrels per day to 150,000 barrels per day (the Stanolind Crude Oil Purchasing Company, a subsidiary of the Standard Oil of Indiana), one of the principal purchasers of crude oil within the State of Oklahoma, at once lowered its posted price for crude oil purchased within the State from $1.07 per barrel to 67¢ per barrel, and that on March 5, 1931, upon the written request of the Governor of Oklahoma, the Corporation Commission, without further hearing, immediately rescinded its announcement of March 4, 1931, thereby determining the production of oil upon the caprice of the Governor and the cut in price (by the Stanolind Crude Oil Purchasing Company). (R., vol. I, pt. 1, p. 18; vol. II, pt. 2, pp. 231-233.)

**(a) UMPIRES AND OPERATORS' COMMITTEE.**

**(1) Assuming the Commission had authority to appoint Collins and Bradford umpires, nevertheless, the Commission had no authority to delegate to Collins and Bradford, or to either of them and the Operators' Committee, any jurisdiction of a discretionary nature, and all the rules and regulations undertaking to vest any powers in Collins and Bradford other than purely clerical and ministerial, are void, and consequently the Com-**

**mission's rules vesting Collins and Bradford with jurisdiction over gauges and the amount of oil to be run by any operator are void because they involve the exercise of judgment and discretion. (26th Assignment of Error, R. vol. 1, pt. 2, p. 386.)**

This proposition seems to be fundamentally true.

*Ontario Knitting Co.* v. *State*, 205 N. Y. 409, 98 N. E. 909;

*State* v. *Apalachicola No. R. Co.*, 81 Fla. 394, 88 So. 310;

*Moore* v. *Wilson*, 84 Kan. 745, 115 Pac. 548;

*Gaddis* v. *Cherokee County Road Commission*, 195 N. C. 107, 141 S. E. 358;

*New York Cent. R. Co.* v. *Public Service Com.*, 134 N. E. 282 (Ind.);

*Throop on Public Officers*, Secs. 569 to 573, inc;

*Mechem on Public Officers*, Sec. 567; 46 *C. J.*, p. 1033.

The very fact that the Commission undertook to vest the Umpires and the Operators' Committee with discretionary powers conclusively shows that the Commission was a mere tool of the operators and not functioning within its jurisdiction. It must be admitted that the Commission could not delegate any authority to the Operators' Committee because the Operators' Committee's appointment was not approved by the governor as required by Section 5 of the Curtailment Act.

Section 2 of the decretal part of the Commission's order of June 30th, 1930 (R., vol. 2, pt. 2, p. 95), provides:

"Ray M. Collins is hereby appointed as Umpire and Agent of the Corporation Commission

to enforce the rules and regulations herein made, and he is hereby authorized to employ as many assistants as he shall deem necessary. To assist the Umpire in administering these rules and regulations, the following Committees of Operators are appointed as agents of the Corporation Commission for the following named pools respectively:"

(Here follows names of the committees.)

In that same order the Commission found (R., vol. 2, pt. 2, p. 94):

"(k) *That the Umpire and Operators Committee are authorized to fix, from time to time, the rate of curtailment necessary in said area in order to conform the actual production to the actual demand from that area, with a maximum allowance of 25% of potential; it being understood, however, that whatever demand there is from the Oklahoma City pool shall be prorated among all of the producing leases therein.*

"(l) With reference to East Earlsboro, the Corporation Commission finds that * * * the *Umpire and Operators Committee shall have authority to readjust the percentage* so that a minimum production of 20,000 barrels per day from the pools as a whole shall be allowed."

In that same order (R., vol. 2, pt. 2, p. 98) the Commission found:

* * * "*In case the reasonable market demand (in the Oklahoma City pool) shall at any time be less than 25% of the potential production the Umpire and Operators' Committee*

*shall fix such percentage of potential production as will allow a production equal to said reasonable market demand.* * * *

*"Then and in that event the Umpire and Operators' Committee shall fix a percentage of potential production (in the East Earlsboro pool) which will allow the pool as a whole to produce a minimum of 20,000 barrels per day."*

The Commission, in its order of August 30th, 1930, (R., vol. 2, pt. 2, p. 116) retained jurisdiction and ordered the Umpire and Operators' Committee to report "any adjustment or fixing of percentages or well production," etc., but the Operators' Committee and the umpires still retained their discretionary powers conferred by former orders.

The Commission's order of October 28th, 1930 (R., vol. 2, pt. 2, p. 134), provided:

"* * * the Commission therefore finds that the orders, rules and regulations should be made sufficiently flexible so that increases or decreases in market demand from said Oklahoma City pool and increases or decreases in potential production therefrom, can be recognized by ancillary orders of the Commission, and that for this purpose the Umpire and Operators' Committee should be instructed to compute from time to time, the rate of curtailment necessary in order to conform the permitted production to the reasonable market demand from the said Oklahoma City pool and to report the same to the Commission with the facts in support thereof as a basis for such ancillary order."

In that same order (R., vol. 2, pt. 2, p. 139) the Commission found:

> "*The production so shown shall constitute the potential for said lease until the next gauge is taken.* During the time this Order is in force a similar gauge of each property shall be taken from time to time as the Umpire and Operators' Committee may designate but not less than once each month, except that in the entire Greater Seminole area, aside from South Earlsboro, East Earlsboro, East Little River, Sasakwa, Konawa, West Asher-Wanette, Earlsboro Townsite and Wilcox wells in Allen pools, and in the 'Class A' pools, the gauge *may, upon direction of the Umpire,* be determined by applying the proper decline curve for each lease so gauged."

and also (R., vol. 2, pt. 2, p. 140) provided therein:

> "The Commission may, by ancillary order, temporarily reduce the allowable percentage of production for any pool upon the *recommendation of the Umpire and Operators' Committee* that it is necessary to do so in order to allow producers who may be underproduced to catch up with their respective quotas."

In the decretal part of the order of October 28th, 1930, the Commission found (R., vol. 2, pt. 2, p. 146):

> "Should the demand for crude oil from the State of Oklahoma increase prior to December 31, 1930, to such an extent as to permit a greater outlet from the pools herein mentioned, the Umpire shall report the facts to the Commission, together with the recommended percentages, and the Corporation Commission hereby gives notice that such revised percentages may be substituted for the percentage provided for in this order."

In the Commission's order of December 30th, 1930 (R., vol. 2, pt. 2, p. 183), it is provided:

> "Then the corrected potential of such well for said current potential period shall be *agreed on by the operator of such well, the Umpire and the majority of the Operators' Committee,* and in the event they are unable to so agree, the Umpire shall immediately refer the matter to the Corporation Commission for determination, and pending final determination by the Corporation Commission, the corrected potential of such well for such current potential period *shall be that fixed by the Umpire and a majority of the Operators' Committee.*"

In the Commission's order of May 29th, 1931 (R., vol. 2, pt. 2, p. 213), it is provided:

> "The *Umpire shall permit to be supplied any reasonable market demand* over and above the reasonable market demand necessary to take care of the percentage of production provided in the preceding paragraph hereof, but shall from time to time allot the same to the under-produced and under-run wells."

The Commission also expressly retained jurisdiction.

In the Commission's order of June 27th, 1931 (R., vol. 2, pt. 2, p. 214), we find exactly the same provision as above quoted.

In *State* v. *Apalachicola Northern R. Co.*, 81 Fla. 394, 88 So. 310, the Court said:

> "But the statute does not give the board power to confer upon an employee authority to make rules or regulations, *nor to determine when rules*

*or orders of the board shall or shall not be applicable.* Under the statute the board, not the Plant Commissioner, must determine when the 'danger of the dissemination of such insect pests or disease has ceased' and the board, not the Plant Commissioner, must give notice of such determination. Such a rule could not be valid for the reason that authority to determine its applicability in a given case, or that the necessity for its continuance in force had ceased could not be delegated by the board to the Plant Commissioner. In attempting to delegate this authority to the Plant Commissioner the respondent State Plant Board went beyond its statutory power; its action was to that extent therefore, unauthorized, and the rule complained of was without authority and is void."

(2) **The Legislature had no power to delegate authority to the Commission to create the office of Umpire and prescribe the qualifications and duties thereof and arrange for his salary, and if Section 5 of the Curtailment Act is construed to vest that authority in the Commission, it is void under Section 1 of Article 4 and Section 1 of Article 5 of the Oklahoma Constitution, questions neither raised, discussed nor passed upon by the Oklahoma Supreme Court in the Julian decision. (25th Assignment of Error, R. vol. 1, pt. 2, p. 386.)**

Evidently this proposition will not be disputed.

*State ex rel. Young* v. *Butler,* 105 Me. 91, 24 L. R. A. (N. S.) 744;

*State* v. *Smiley,* 304 Mo. 549, 263 S. W. 825;

*In re* County Commissioners of Counties Comprising Seventh Judicial District, 22 Okla. 435;

*Gilhooly* v. *Elizabeth,* 66 N. J. L. 484, 49 Atl. 1106;

*King* v. *Concordia Fire Ins. Co.,* 140 Mich. 258, 6 Am. & Eng. Ann. Cas. 87;

*Ploner* v. *Standard Oil Co.* (7th Cir. Ap.), 284 Fed. 35;

Sec. 1, Art. 6, Oklahoma Constitution;

Sec. 36, Art. 5, Oklahoma Constitution;

Sec. 1, Art. 4, Oklahoma Constitution.

**(3) The payment of salaries by the Operators' Committee to Collins and Bradford is against public policy, and vitiated all their alleged official acts. (28th Assignment of Error, R. vol. 1, pt. 2, p. 387.)**

The trial court *excuses* the Commission's appointment of Collins and Bradford and the payment of their salaries and expenses by private oil operators interested in dominating their acts by saying the Legislature had made no special appropriation for the enforcement of this act and that "while this method of compensating agents of the Commission is calculated to breed suspicion and distrust and destroy confidence in the integrity of the Commission, the evidence does not establish that such agents and employees of the Commission have been guilty of favoritism or dishonesty," etc. (R., vol. 1, pt. 2, p. 207), which is contrary to the highest authority (3rd verse of Chapter 1 of the Prophet Isaiah) wherein the Prophet said, "The ox knoweth his owner, and the ass his master's crib," and in violation of the rule announced in the 24th verse of Chapter 6 of St. Matthew

that "No man can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Ye cannot serve God and mammon."

Why did the Commission fail to put the administration of this act and its rules and regulations in the hands of its *"chief oil and gas conservation agent,"* authorized by the Act of 1917, and for whose salary and expenses the Legislature has appropriated large sums from 1917 down to date?

By Act approved February 16th, 1917 (House Bill No. 136, p. 385, Okla. Session Laws, 1917, Sections 8013 and 8014, Okla. Comp. St. 1921, a copy of which will be found in Appendix "F" (page 193), the Legislature "empowered and authorized" the Corporation Commission "to create and establish an oil and gas department under the jurisdiction and supervision of the Corporation Commission" and authorized the Commission "to appoint, with the approval and consent of the Governor, *a chief oil and gas conservation agent*, who shall have charge of the oil and gas department herein authorized." Also, by Section 2 of the Act, "All authority and duties now conferred upon the Corporation Commission or other departments of the state government in reference to the conservation of oil and gas and the drilling and operating oil and gas wells and the construction and regulation of oil and gas pipe lines, are hereby conferred exclusively upon the Corporation Commission."

The constitutionality of the above act was upheld in *Love* v. *Boyle*, 72 Okla. 300.

Section 6 of the Act repealed "all acts and parts of acts in conflict herewith," and thereby displaced any power, if any ever existed, in the Commission under Section 5 of the Curtailment Act to appoint or employ umpires to supervise the conservation of oil and gas.

For each year from and including 1917 to and including the fiscal year ending June 30th, 1933, the Legislature has made substantial appropriations to the *"Corporation Commission"* for the expenses of enforcement of the oil and gas conservation laws and salaries of conservation officers and their assistants.

The following Acts made the following appropriations:

| | |
|---|---|
| (1) House Bill No. 570, Session Laws 1917, p. 285 | $135,000.00 |
| (2) Chapter 183, Extra Session Laws 1921, p. 200 | 70,000.00 |
| (3) Chapter 49, Session Laws 1923, pp. 60-73 | 83,400.00 |
| (4) Chapter 51, Extra Session Laws 1923-24, p. 63 | 43,700.00 |
| (5) Chapter 66, Session Laws 1925, pp. 98-109 | 111,000.00 |
| (6) Chapter 27, Session Laws 1927, pp. 27-37 | 78,000.00 |
| (7) Chapter 233, Session Laws 1929, pp. 278-279 | 128,000.00 |
| (8) Senate Bill 63, Session Laws 1931, p. 300 | 123,000.00 |
| Total | $772,100.00 |

Thus, for the period since 1926 when proration was begun in the Seminole field, and down to date the Legislature has appropriated for oil and gas conservation $384,000.00.

The Commission at all times knew that Collins and Bradford were receiving their salaries and expenses from large interests engaged in the oil business, and that Collins' annual salary so paid was twice the combined official salaries of the three Commisisoners. Such conduct is clearly against the public policy of Oklahoma, as shown by the Oklahoma statutes, and constitutes a dubious and dangerous alliance between government and big business.

Section 1 of Article 15 of the Oklahoma Constitution requires members of the Legislature and all judicial, state and county officers, "before entering upon the duties of their respective offices," to take and subscribe to an oath or affirmation that they "will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the *performance* or non-performance of any act or duty pertaining to" their office, "other than the compensation allowed by law."

Section 126, Okla. Comp. St. 1921, requires this oath to be taken by "every state, county, township, city, town, school district, or other officer * * * and *every deputy or assistant of any such officer* * * * before entering upon the duties of his office."

The following Oklahoma statutes clearly show that the acceptance of compensation from private persons is against the fixed public policy of Oklahoma:

"Sec. 1561. Any person who executes any of the functions of a public office *without having taken and duly filed the required oath of office,* or without having executed and duly filed the required security, is guilty of a misdemeanor; and in addition to the punishment *prescribed* therefor, he forfeits his right to the office."

"Sec. 1569. Any executive officer who asks or receives any *emolument,* gratuity or *reward,* or any promise of any emolument, gratuity or reward, excepting *such as may be authorized by law,* for doing any official act, is guilty of a misdemeanor."

"Sec. 1570. Any executive officer who asks or receives any emolument, gratuity or reward or any promise of any emolument, gratuity or reward, for omitting or deferring the performance of any official duty, is guilty of a misdemeanor."

Sec. 1573. Any person who gives or agrees, or offers to give any gratuity or reward in consideration that himself or any other person shall be appointed to any public office, or shall be permitted to, or to exercise, perform or discharge the prerogatives or duties of any office, is punishable by imprisonment in the county jail not less than six months nor more than one year, or by a fine of not less than two hundred dollars or more than one thousand dollars, or both."

These sections are made applicable to administrative officers by Section 1579, which is as follows:

"The various provisions of this article which relate to executive officers apply in relation to officers in the same manner as if administrative

and executive officers were both mentioned together."

Also the following Sections of the Oklahoma Comp. St. 1921, show the public policy of this State:

"Sec. 1609. Whoever corruptly gives, offers or promises to any executive, legislative, county, municipal, judicial or other public officer, or *any person assuming* to act as such officer, after his election or appointment, either before or after he has qualified or has taken his seat, any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which then may be pending, or may by law come or be brought before him in his official capacity, or as a consideration for any speech, work or service in connection therewith, shall be punished by imprisonment in the state penitentiary not exceeding five years, or by a fine not exceeding three thousand dollars and imprisonment in jail not exceeding one year."

"Sec. 1602. Any person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, *umpire* or assessor, or to any person who may be authorized by law or agreement of parties interested to hear or determine any question or controversy, with intent to influence his vote, opinion or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in the penitentiary not exceeding ten years, or by a fine not exceeding five thousand dollars, or both."

"Sec. 1605. Any judicial officer, juror, referee, arbitrator or *umpire*, who accepts any gift from

any person, knowing him to be a party in interest or the attorney or counsel of any party in interest to any action or proceeding then pending or about to be brought before him, is guilty of a misdemeanor."

"Sec. 6329. The officers and persons herein mentioned shall be entitled to receive for their services only the fees and compensation herein allowed, and no other, except as may be otherwise required by law."

Section 6457, Okla. Comp. St. 1921, declares that "any public officer who shall knowingly charge, *demand or receive any fees not provided by law*, or who shall charge, demand or receive any greater fees than are hereby provided in this article shall be deemed guilty of a misdemeanor * * *."

"Contracts for the sale of offices are void as against public policy on the ground that they operate to interfere with the unbiased duty of public officers, and because of the serious dangers of bribery and corruption that would be incident to such a practice." (22 R. C. L. p. 538.)

Public policy renders void an assignment of the emoluments of office. (22 R. C. L., p. 541.)

The election of a public officer is invalidated by the promise of the candidate that if elected he will serve for less than the salary fixed by law.

*State ex rel.* v. *Collier*, 72 Mo. 13, 37 Am. Rep. 417;

*State ex rel.* v. *Purdy*, 36 Wis. 213, 17 Am. Rep. 485;

*Lukens* v. *Nye*, 156 Cal. 498, 105 Pac. 593, 36 L. R. A. (N. S.) 244;
*State ex rel. Bill* v. *Elting*, 29 Kan. 397;
*Carrothers* v. *Russell*, 53 Ia. 346, 36 Am. Rep. 222;
*Bush* v. *Head*, 154 Cal. 277, 97 Pac. 512;
*Prentiss* v. *Dittmer*, 93 Ohio St. 314, 112 N. E. 1021, L. R. A. 1917-B, 191;
*Miller* v. *United States*, 103 Fed. 415;
*Somerset Bank v. Edmund*, 76 Ohio St. 396, 11 L. R. A. (N. S.) 1171.

Why did the Commission repeatedly make findings of inflated and exaggerated potential production for the Oklahoma City field? The Commission, on February 10th, 1931, admitted that its former findings of potential for the Oklahoma City field, upon which markets were prorated, was more than three times the correct potential (R., vol. 2, pt. 2, pp. 203-204).

Collins also admitted (R., vol. 1, pt. 2, pp. 290-291) that while the Commission's findings of the potential production in the Seminole field and the balance of the State outside of Oklahoma City were correct, "the potential figures for the Oklahoma City field is 'just an exaggeration'" and that the percentages stated in Plaintiff's Exhibit 11 (R., vol. 2, pt. 1, p. 3) were not correct. Yet the Commission, in its order of February 10th, 1931 (R., vol. 2, pt. 2, p. 203), states that "the Umpire now estimates on this basis 6,254,964 barrels potential production" for the Oklahoma City field. Of course, the larger potential for the Oklahoma City field should have resulted favorably to the operators

in that field, but as a fact, under the Commission's regulations, it did not, as the Commission fluctuated the amount saleable out of that field from time to time without regard to the amount of production, and this is shown by the facts and figures above set forth.

What constitutes such discrimination as denies the equal protection of the laws guaranteed by the 14th Amendment is thoroughly outlined by Chief Justice Taft in *Truax* v. *Corrigan*, 257 U. S. 312; 27 A. L. R. 375, especially beginning on page 385. Also see the opinion of Justice Harlan in *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540; 46 L. Ed. 679.

Chief Justice Taft, in *Truax* v. *Corrigan, supra*, approves the opinion of Mr. Justice Field in *Barbier* v. *Connolly*, 113 U. S. 27; 28 L. Ed. 923, holding that the Fourteenth Amendment intended "not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given *to all under like circumstances*, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others *in the same calling and condition.*"

The Commission's rules and proration orders deny plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. In that they classify the oil fields and allow a production of 50 per cent in

some of the fields, 100 per cent in other fields, 25 per cent in other fields, and less than 3 per cent in the Oklahoma City field.

A constitutional law unconstitutionally enforced entitles the plaintiff to an injunction. Thus in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 221-227, this Court said:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is *applied and administered by public authority with an evil eye and an unequal hand,* so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in *Henderson* v. *Mayor, etc., of New York,* 92 U. S. 259 (Bk. 23, L. Ed. 543); *Chy Lung* v. *Freeman,* 92 U. S. 275 (Bk. 23, L. Ed. 550); *Ex Parte Va.,* 100 U. S. 339 (Bk. 25, L. Ed. 676); *Neal* v. *Delaware,* 103 U. S. 370 (Bk. 26, L. Ed. 267), and *Soon Hing* v. *Crowley* (*supra*)."

Also see *Wagner* v. *Covington,* 251 U. S. 102, 64 L. Ed. 167.

**(b) GAUGES.**

The Commission's order of June 30th, 1930 (R., vol. 2, pt. 2, pp. 85-96), prescribes the rule and method of gauging wells to be operated upon a percentage basis, as follows:

> "Where percentage proration is applied a gauge of producing wells shall be taken by the

Umpire or under his supervision in the following manner: the gauge to determine potential shall be taken by each operator in the pool in respect of the lease or leases owned by him therein and then producing, such gauge to be taken between the hours of seven A. M. on the day set by the Umpire and seven A. M. on the following day. Prior to the taking of such gauge and in respect of each producing lease covered hereby, the Umpire shall appoint a representative of an operator owning a lease adjoining the particular property to be gauged, and shall notify the operator whose property is to be gauged of the name of the representative, such notification to be given prior to the taking of such gauge. It shall be the positive duty of such representative to remain on the lease that is being gauged throughout the entire day that the gauge is being taken to witness the gauging of the production therefrom; and immediately upon the completion of such gauge, such witness and the operator whose property was gauged shall file a written statement with the Umpire showing the production of said lease, and of each well thereon for the day said gauge is taken. *The production so shown shall constitute the potential for said lease until the next gauge is taken.* During the time this Order is in force a similar gauge of each property shall be taken from time to time as the Umpire may designate, but not less than once each month, except that in the entire Greater Seminole area, aside from South Earlsboro, East Earlsboro, East Little River, Sasakwa, Konawa, West Asher-Wanette, Earlsboro Townsite and Wilcox wells in Allen pools, the gauge may, upon direction of the Umpire, be determined by applying the proper de-

cline curve for each lease so gauged." (Italics ours.)

This same rule has been kept in force and effect down to date. See Rule of August 30th, 1930. (R., vol. 2, pt. 2, pp. 108-116.)

See Rule of September 30th, 1930. (R., vol. 2, pt. 2, p. 117.)

On October 10th, 1930 (R., vol. 2, pt. 2, pp. 122-124), the Commission extended its orders until and including October 20th, 1930, and "until further order of this Commission."

On October 28th, 1930 (R., vol. 2, pt. 2, p. 124), by order in force at this time with certain modifications, the Commission re-adopted the method of gauging set forth in its order of June 30th. (See R., vol. 2, pt. 2, p. 138, paragraph 3.)

On November 8th, 1930 (R., vol. 2, pt. 2, pp. 151-153), the Commission extended its order of October 28th, 1930, over other oil fields, "provided, however, that the *Umpire and Operators' Committee* heretofore designated, selected and appointed for said area, be and they are hereby *authorized* upon application of the operator of any oil and gas lease in said area, and proper showing, to temporarily *exempt* from the terms and provisions of said Order any such lease where it is shown that the encroachment of water would injuriously affect the wells thereon, so as to prevent, rather than to aid, conservation of crude oil and petroleum."

On December 4th, 1930 (R., vol. 2, pt. 2, pp. 154-156), the Commission made another order regulating gaug-

ing on time proration, whereby each operator in the Oklahoma City field was allowed to produce four hours continuously (under the rule of November 3rd, 1930 (R., vol. 2, pt. 2, p. 149), and thereafter required to shut in his wells for 65 days, and for longer than that if he got more than his proportion of the oil, *according to his unofficial report,* not according to the report of any sworn official representing the state.

On December 30th, 1930 (R., vol. 2, pt. 2, p. 159), the Commission made an order modifying its former orders and purporting to prescribe rules for the production of oil during January, February and March, 1931, and again reiterated its method of taking gauges on the percentage basis. (See R., vol. 2, pt. 2, p. 171, paragraph 3.)

On that same day, December 30th, 1930 (R., vol 2, pt. 2, pp. 180-184), the Commission made another order regarding time proration. In other words, time proration was not based on the capacity of the well, but on the time the person was allowed to run his wells. • • •

> "(6) The Umpire shall appoint a representative *of an operator* who is in no way interested in the well to be tested to be present and witness the test being made of each well, and it shall be the duty of the representative so appointed by the Umpire to remain at the well which is being tested during the entire time the same is being produced for the purpose of determining its potential, and to witness all operations, tests for (bottom sediment) and/or water content, measurements and/or calculations made for the purpose of determining the actual production of

oil made by the well being tested during the test period as above defined. Immediately upon the completion of such test, the representative appointed by the Umpire and the representative of the operator shall file with the Corporation Commission, and a copy thereof with the Umpire, a written statement duly verified by both representatives on form to be approved by the Corporation Commission, showing the amount of oil produced by said well during the test period as above defined. (R., vol. 2, pt. 2, p. 184.)

"(7) In the event the Umpire's representative, and well owner's representative at the testing of the well, are agreed as to the daily potential of the well as determined by the test, the operator may continue forthwith to produce said well until there has been produced therefrom, including the amount produced during the test, the total allowable, to be calculated as hereinafter provided, for the current month. In the event the representatives of the Umpire and the well owner are not agreed as to the daily potential of any well, the well shall be shut in at the close of the test, and the matter referred to the Umpire. If the Umpire and the operator agree as to the daily potential of the well, the operator shall, thereupon, be permitted to produce the well until it has produced, including the amount produced during the test, its tentative allowable for the current month based upon the potential so agreed upon. If well owner and Umpire are unable to agree as to the daily potential of any well, the matter shall be referred to the Corporation Commission for determination, and, pending final determination

> by the Commission, the operator shall be permitted to produce the well until, on the basis above outlined, it has produced a tentative allowable for the current month calculated on the basis of the daily potential as fixed by the Umpire." (R., vol. 2, pt. 2, p. 185.)

If the operators making the gauge agree, the Commission accepts their finding, i. e., prorated production on the finding of private parties acting for themselves. (R., vol 1, pt. 2, pp. 202-203.)

Plaintiff therefore submits:

FIRST.

**That without Section 5 requiring the Commission to gauge each well, Section 4, purporting to authorize proportionate taking, would be void under the Fourteenth Amendment in that it would delegate to the Commission an uncontrollable discretion and arbitrary power over all oil operators in the state—a power unlimited by any provisions of the statute and unascertainable by any oil operator. (See 21st Assignment of Error, R., vol. 1, pt. 2, p. 385.)**

No such power was contemplated by the Legislature and therefore Section 5 appears in the Act.

In *Langford* v. *United States*, 101 U. S. 341-346, the first paragraph of the syllabus says:

> "The maxim, that the King can do no wrong, has no place in our system of constitutional law, as applicable either to the government or to any of its officers."

In *Garfield* v. *United States*, 211 U. S. 262, Mr. Justice Day said:

> "But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power," etc.

In *Welch, Insurance Com'r.* v. *Maryland Casualty Co.*, 47 Okla. 293, the court held an Act of the Oklahoma Legislature violated the 14th Amendment to the National Constitution in that it undertook to vest in the insurance commissioner "a discretionary and arbitrary power to license or to withhold a license from whomsoever he will" as an agent for a foreign insurance company in Oklahoma. This question was not submitted to or decided by the Oklahoma Supreme Court in the *Julian case*, 145 Okla. 237, 292 Pac. 841.

That sec. 4 would be void without sec. 5, see:

*Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220;

*State ex rel.* v. *Superior Court*, 12 A. L. R. 1428, and annotation;

*Elkhart* v. *Murray*, 165 Ind. 304, 1 L. R. A. (N. S.) 940;

*Cicero Lumber Co.* v. *Cicero*, 176 Ill. 9, 42 L. R. A. 696, 68 Am. St. Rep. 155;

*Mayor, etc., of Baltimore* v. *Radecke* (Md.), 33 Am. Rep. 239;

*Noel* v. *People*, 187 Ill. 587, 79 Am. St. Rep. 238, 52 L. R. A. 287;

*Hays* v. *Poplar Bluff*, (Mo.) L. R. A. 1915-D, 595;

*Montgomery* v. *West*, 149 Ala. 311, 9 L. R. A. (N. S.) 659;
*Devereaux* v. *Township Board*, 211 Mich. 43, 177 N. W. 967;
*State* v. *New Orleans C. & L. R. Co.*, 49 La. Ann. 1571, 39 L. R. A. 618;
*City of La Junta* v. *Heath*, 38 Colo. 372, 88 Pac. 460;
*Richmond* v. *Dudley*, 129 Ind. 112, 28 Am. St. Rep. 180;
*Cutsinger* v. *City of Atlanta*, 142 Ga. 555, L. R. A. 1915-B, 1097;
*Boyd* v. *Board of Council*, 117 Ky. 208, 111 Am. St. Rep. 240;
*Bear* v. *City of Cedar Rapids*, 147 Ia. 341, 27 L. R. A. (N. S.) 1150;
*Mandeville* v. *Band*, 111 La. 806, 35 So. 915;
*Goodale* v. *Sowell*, 62 S. C. 516, 40 S. E. 970;
*City of Richmond* v. *Model Steam Laundry*, 111 Va. 758, 69 S. E. 932;
*Los Angeles* v. *Hollywood Cemetery Ass'n*, 124 Cal. 344, 71 Am. St. Rep. 75.
*State* v. *Dubarry*, 44 La. Ann. 1117, 11 So. 718;
*State* v. *Kuntz*, 47 La. Ann. 106, 16 So. 651;
*Sioux Falls* v. *Kirby*, 6 S. D. 62, 25 L. R. A. 623;
*State* v. *Kantler*, 33 Minn. 69, 21 N. W. 856.

The first sentence in Section 4 providing "That whenever the full production from any common source • • • can only be obtained under conditions constituting waste, as herein defined (clearly meaning

without a market for all oil at a price determined by the Corporation Commission under Section 2), then any person, firm or corporation, having the right to" produce from such common source "may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom, without waste (meaning without a full market as interpreted by the Commission), as the production of the well or wells of any such person, firm or corporation, bears to the total production of such common source of supply," is, without the next sentence, void for uncertainty in that it prescribes no standard by which an operator can determine his proportionate part for the reason that he has no means of knowing by any fixed standard the amount of the full production of the field or the exact amount of the market demand for the field. How could an operator know when he is violating that provision of the statute? By itself the first sentence in Section 4 is therefore void for uncertainty.

*Smith* v. *Cahoon, Sheriff*, 283 U. S. 553;

*Connally* v. *General Construction Co.*, 269 U. S. 385;

*Cline* v. *Frink Dairy Co.*, 274 U. S. 457;

*United States* v. *L. Cohen Gro. Co.*, 255 U. S. 81;

*International Harvester Co.* v. *Kentucky*, 234 U. S. 216;

*Collins* v. *Kentucky*, 234 U. S. 634;

*Atlantic Refining Co.* v. *Trumbull, Governor*, 43 Fed. (2d) 154;

*Chicago & Northwestern Ry. Co.* v. *Railroad Commission*, 280 Fed. 398;

*L. & N. R. R. Co. v. Commonwealth,* 99 Ky. 132, 59 Am. St. Rep. 457;
*State* v. *Lantz,* 90 W. Va. 738. 111 S. E. 766;
*Ex parte Schmolke,* 248 Pac. 244 (Cal.);
*Ex parte Jackson,* 45 Ark. 158;
*Patten* v. *Aluminum Castings Co.,* 135 Ohio St. 1, 136 N. E. 426;
*Ex parte Peppers,* 186 Cal. 682, 209 Pac. 896.

The second sentence in Section 4 authorizes the Commission to so "regulate the taking of crude oil or petroleum from any or all such common sources of supply * * * as to prevent the inequitable or unfair taking, from a common source of supply, of such crude oil or petroleum, by any person, firm or corporation." This sentence, without Section 5, would vest unlimited legislative and discretionary powers in the Commission in violation of the rule stated in the above authorities and in violation of Section 1 of Article 4 of the Oklahoma Constitution dividing the powers of the state government into three separate departments, Legislative, Executive and Judicial, and declaring that they "shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others;" also in violation of Section 1 of Article 5 of the Oklahoma Constitution vesting the "legislative authority of the state" in a "Legislature, consisting of a Senate and a House of Representatives."

Therefore, Section 5 of the Act is a necessary adjunct to Section 4 because without a gauge of the wells, as required by Section 5, neither the *operator*

*nor the Commission* would have any standard by which to determine the amount of oil *less than all*, an operator can take from a given field.

Webster defines the word "gauge" to mean "To find the exact measurement of, as of rainfall. To measure or ascertain the amount of contents of or the capacity of, as of a pipe, barrel or keg. To measure the capacity, character, or ability of; to estimate; to judge of. To measure or limit by or as by a gauge, especially so as to conform to a standard; to measure off or set out; as, to gauge a wire, a line," etc.

*Therefore, the gauging of the wells is a condition precedent to the making and enforcing of any orders restricting the production from a common source to an amount less than the full capacity thereof because (a) without Section 5 requiring a gauge, Section 4 would be unconstitutional, and (b) a gauge is a statutory prerequisite to the exercise of the authority conferred on the Commission by Section 4.* (22d Assignment of error, R., vol. 1, pt. 2, p. 385.)

(NOTE: Collins, state wide Umpire, under whose supervision gauges were made, testified (bottom Page 289, R., vol. 1, pt. 2) "that the operators in the Oklahoma City field are not given any notice of the taking of any gauge in the Greater Seminole area, and, conversely, operators in the Seminole area are not given any notice of the taking of potential in the Oklahoma City field." See Trial Court Finding that no notice was given. (R., vol 1, pt. 2, p. 204, last line in first paragraph.)

As the potential in one field affected materially the amount an operator in another field was allowed to produce, we contend the gauges should be made by a sworn *state* officer or notice served on all operators of time of gauge.)

SECOND.

**That a gauge made in accordance with the rules of the Commission permitting the operator to gauge his own wells in presence of a representative of an adjoining operator, although agreed to by a majority of the Operators' Committee or the umpire, is void in that private parties are permitted to determine the basis (potential production) for the proration of production and consequently markets in which all operators are interested. That no such power and authority can be delegated to private persons is clear. (See Assignments of Error 23-24 and 27, R., vol. 1, pt. 2, p. 386.)**

The trial court made an extended special finding as to gauges, which recites the procedure incident thereto, in detail. (Rec., vol. I, pt. 2, pp. 200-205, inc.)

That gauges made by private persons are void, see:

*Washington, ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 73 L. ed. 210;

*Eubank* v. *Richmond*, 226 U. S. 137, 57 L. ed. 156, 42 L. R. A. (N. S.) 1123;

*State* v. *Crawford*, 104 Kan. 141, 2 A. L. R. 880;

*Tilford* v. *Belknap*, 126 Ky. 244, 11 L. R. A. (N. S.) 708;

*Hays* v. *Poplar Bluff*, 263 Mo. 516, L. R. A. 1915-D, 595;

*St. Louis* v. *Howard*, 119 Mo. 41, 41 Am. St. Rep. 630;

*State ex. rel. Nehrbass* v. *Harper*, 162 Wis. 589, 156 N. W. 941;

*St. Louis* v. *Russell*, 116 Mo. 248, 20 L. R. A. 721;

*State ex. rel. Omaha Gas Co.* v. *Withnell*, 78 Neb. 33, 8 L. R. A. (N. S.) 978, 126 Am. St. Rep. 586;

*Owensboro & Nashville R. Co.* v. *Todd*, 91 Ky. 175, 11 L. R. A. 285;

*Coster* v. *Tide Water Co.*, 18 N. J. Eq. 63;

*Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218;

*State* v. *Tenant*, 110 N. C. 609, 28 Am. St. Rep. 715;

*Chicago* v. *Trotter*, 136 Ill. 430;

*Marx* v. *Maybury*, 36 Fed. (2d) 397;

*State of Washington* v. *Fairchild*, 224 U. S. 510, 56 L. ed. 863;

*Londoner* v. *Denver*, 210 U. S. 373, 52 L. ed 1103;

*Soliah* v. *Heskin*, 222 U. S. 522, 56 L. ed. 294;

*Northrop* v. *City of Waterbury*, 81 Conn. 305, 70 Atl. 1024;

*Byrnes* v. *Borough of Riverton*, 64 N. J. L. 210, 44 Atl. 857.

The delegation of such powers to private persons violates the 14th Amendment as shown by the above authorities.

In *State* v. *Crawford*, 104 Kan. 141, 2 A. L. R. 880,

*supra,* the court held that "The Legislature cannot delegate to private individuals and private associations of persons the power to make obligatory rules concerning the management and care of property, nor provide that the breach of such rules shall be a penal offense."

*In Washington, ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U. S. 116, 73 L. Ed. 210, and *Eubank* v. *Richmond,* 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, *this court held that municipal ordinances conditioning the enjoyment of property upon the consent of private persons (other property owners) are unconstitutional and void.*

These so-called gauges having been made by private owners and not by any impartial official representative of the state, are void because they furnish the basis—the very foundation—upon which the Commission rests its orders limiting the plaintiff's right to produce oil. Assuming, without conceding, that the state, in the exercise of its police power, may restrict production of oil where full production cannot find a "reasonable market demand," nevertheless, there must be some standard of measurement by which the producer can know in advance the proportionate part he is entitled to take, and this proportionate part must be determined in a constitutional manner. Plaintiff's right to produce cannot be made dependent upon what *private* persons determine to be the capacity of the common source.

Although plaintiff may have no complaint against the gauge of its wells, nevertheless *the amount*

*of oil it is allowed to produce is made dependent upon the gauge of all the other wells in all the fields* and that gauge must be made by an impartial official who represents the state, plaintiff and all other producers. It cannot be made by *private* persons, reported by them to the umpire, accepted by the umpire, reported by him to the Commission, and adopted by the Commission.

The opportunity for fraud in such arrangement is too great for frail humanity to overcome.

THIRD.

**That gauges made under the supervision of Collins and Bradford are illegal and void because their appointment as umpires was against public policy. They never subscribed to any oath of office. The proration orders and regulations are all permeated with this inseparable, fatal vice. No one should be coerced under threatened penalties to recognize such gauges.**

It is not necessary to prove any actual fraud by the umpires in order to set aside all gauges. The law will not tolerate such conduct and the rules governing transactions between fiduciaries should apply.

In other words, as said in *Okfuskee County* v. *Hazelwood*, 79 Okla. 187, 11 A. L. R. 712, "The door is shut to all investigation. On the principle that a man cannot serve two masters, especially where self-interest is involved, the transaction is vitiated by the law, irrespective of its merits, fairness, or good faith, and whether it is injurious to the client is immaterial."

The principle in the following cases should be applicable:

*Michoud* v. *Girod*, 4 How. 504, 11 L. ed. 1077;
*Hall* v. *Coppell*, 7 Wall. 542;

See the admission of Ex-Attorney General West, Special Counsel for the Governor, that the administration of the law by Umpires appointed by the operators, "is iniquitous". (Rec., vol. I, part 2, p. 371:)

*United States* v. *Dunn*, 268 U. S. 121;
*Donahue* v. *Will County*, 100 Ill. 94.

FOURTH.

**The plaintiff and other operators were entitled to have gauges made under the supervision of a state officer, an officer who had subscribed to the oath required by the Constitution and was free to discharge his official duties without fear of alienating the affections of operators paying his salary and expenses.**

*Stockton Plumbing & Supply Co.* v. *Wheeler*, 68 Cal. App. 592, 229 Pac. 1020-1024;
*Bullock* v. *Robison*, 176 Ind. 198, 93 N. E. 998-1001;
*Singletary* v. *Carter*, (S. C.) 21 Am. Dec. 480;
*Knight* v. *Herrin*, 48 Me. 533;
*Morton* v. *Crane*, 39 Mich, 526;
*City of Fort Wayne* v. *Rosenthal*, 75 Ind. 156;
*Kirkland* v. *The Texas Express Co.*, 57 Miss. 316;
*State* v. *Lazarone*, 130 La. 1, 57 So. 532.

The principles involved are clearly stated and applied by this Court in *Ascanyan* v. *W. R. Arms Co.*, 103 U. S. 261-278 (13 Otto), 26 L. ed. 539.

## (c) PRICE FIXING.

**(1) The Commission has administered the law for the purpose of controlling prices of crude oil without regard to waste. The Commission has not at any time undertaken to protect the co-equal rights of the surface owners except during such periods as overproduction was threatening price structure.**

In the court's examination of the Commission's various orders and rules "any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained," as said in *Smith* v. *St. Louis & S. W. R. Co.*, 181 U. S. 248-257.

In *MacMillan* v. *Railroad Commission of Texas*, 51 Fed. (2nd) 400, a parallel case, a three-judge Federal Court granted an injunction against the enforcement of orders and regulations of the Texas Railroad Commission, though *prima facie* valid, on the ground that the Commission was undertaking to control prices of crude oil in that State under the guise of preventing physical waste. The court penetrated the disguise and mask and found that the Railroad Commission was undertaking to control prices. Circuit Judge Hutcheson, speaking for the court, said:

> "Presumptively valid though such acts are, courts, bound to give effect not to fictions, but to realities, may not, in construing them, close

their eyes to what all men can see. Disregarding pretense, subterfuge, and chicane, courts must, looking through form to substance, ascertain the true purpose of a statute, not from its recitals of purpose, but from the operation and effect of it as applied and enforced. *Smith* v. *Ry. Co.*, 181 U. S. 248, 21 S. Ct. 603, 45 L. ed. 847; *Bailey* v. *Drexel Furn. Co.*, 259 U. S. 20, 42 S. Ct. 449, 66 L. ed. 817, 21 A. L. R. 1432; *Lochner* v. *New York*, 198 U. S. 64, 25 S. Ct. 539, 49 L. ed. 937, 3 Ann. Cas. 1133; *Meyer* v. *Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 67 L. ed. 1042, 29 A. L. R. 1446; *Henderson* v. *New York*, 92 U. S. 259, 23 L. ed. 542; *Chy Lung* v. *Freeman*, 92 U. S. 275, 23 L. ed. 550. • • •

"Especially must this be so when, as here, under the thinly veiled pretense of going about to prevent physical waste the commission has, in co-operation with persons interested in raising and maintaining prices of oil and its refined products, set on foot a plan which, seated in a desire to bring supply within the compass of demand, derives its impulse and spring from, and finds its scope and its extent in the attempt to control the delicate adjustment of market supply and demand, in order to bring and keep oil prices up."

We invite the court to carefully consider the Commission's opinion of February 10th, 1931, by Chairman Walker (R., vol. 2, pt. 2, p. 190), which is conclusive evidence that the Commission, the Operators' Committee and the oil operators favoring proration were concerning themselves not with waste but with markets and prices.

Chairman Walker, speaking for the Commission in its opinion of February 10th, 1931 (R., vol. 2, pt. 2, p. 191, etc.), said:

> "The only question at issue herein, *aside from that of waste* which is always present in any hearing of this character, is, shall the allowable and ratable takings from the Oklahoma City field be increased and if so, how much. The answer to that question is dependent upon the market demand, *a thing wholly elusive and most difficult, if not impossible of determination.* * * *
>
> "The testimony seems to have been very largely determined by the particular interest of the parties themselves. Nor have some of these parties been altogether consistent in their attitude toward proration; thus those desiring immediate opportunity to *market an increased* amount of crude petroleum generally favor an increase in allowable takings under proration, whereas *those more anxious to preserve the market stability,* and to protect interests *elsewhere,* generally favor the maintenance of the present percentage of allowable takings from the Oklahoma City field, and *the least possible market competition.* Some of the producers whose interests are chiefly in the Oklahoma City field, however, stand squarely on the present policy of proration and suggest the limiting of takings to the actual visible market capacity, and that, of course, on a ratable basis, contending that having relied on the policy of proration and the practice of proration in the Oklahoma City field, they have made no effort to provide an immediate or approximate provision for the taking care of increased runs. * * *

"The Oklahoma City field has been prorated until its production has been reduced to the minimum, now approximately 80,000 barrels. Some of the chief producers in this field have made little or no attempt to market their crude petroleum, *hoping for a day when the production generally would have so declined or have been so* taken care of as to bring about a greater or more advantageous market for the Oklahoma City field. * * *

"The amount of allowable takings from the Oklahoma City field must be dependent upon the market demand, and the issues, we think, herein, must be decided *upon that ground.* Before entering upon a discussion of the evidence thereon or a determination thereof, however, we must give attention to the question of waste."

In discussing underground waste the Commission said (R., vol. 2, pt. 2, p. 194):

"While the application of Wirt Franklin is based, partially, apparently, on the right to take additional runs of oil, as an emergency or salvage proposition, the evidence indicates that underground wastage *may be taken care of wholly aside and apart from these applications and that the granting of the applications is not dependent upon the solution of this question.* The Commission's announcement thereon at the conclusion of the hearing is indicative of its intention, as expeditiously as possible, to take care of this kind of wastage in the Oklahoma City field."

Further, the Commission in the same opinion (R., vol. 2, pt. 2, p. 194-195) said:

> *"To that feature of economic waste wrapped up wholly in the question of price fixing,* we shall not advert for the reason that both the State and the Federal Courts and the parties presenting the proceedings involving proration, have assumed, apparently, that the provision of the law relating to price fixing are invalid, and that the Corporation Commission is without authority to sit as a price fixing agency in the determination of the issues. The *price of crude* petroleum, however, is inseparably related to the question of *econ c waste.* It is the demand for crude petroleum at a price which will permit the operation of wells which keeps men employed and wells operating. Without both a market demand and a price which will pay expenses, wells cannot be kept going or petroleum pumping through the pipe lines, to the trade. Therefore, much of the testimony, touching upon economic waste, had to do with the *price* which might be maintained in the Oklahoma City field and which might reflect itself to the other wells in the state, and in determining whether or not they would be kept in operation."

**(2) The Commission has never undertaken to do more than to make a mere estimate of the potential production of the Oklahoma City field and on that estimate, which concededly was greatly exaggerated, undertook to allocate markets.**

See Commission's order of November 3rd, 1930 (R., vol. 2, pt. 2, p. 147), wherein the Commission said:

> "By the terms and provisions of said Order No. 5369 it was found that there should be *allo-*

*cated to the Oklahoma City pool an outlet of* 131,095 *barrels per day in October,* 134,589 barrels per day in November, and 131,003 barrels per day in December, and that this outlet should be used as a basis for fixing the proportional production of the various wells in said pool, until the Commission should find from evidence that a greater or less, *reasonable market demand obtained.*"

This shows the Commission was allocating markets. Each of its orders beginning with June 30th, 1930, undertook to estimate, or rather make a finding of the number of barrels saleable from the State as a whole. It shifted these markets around to suit *itself.*

Thus the Commission in its order of June 30th, 1930 (R., vol. 2, pt. 2, p. 88), found "that the daily demand from Oklahoma is and will be approximately 650,000 barrels per day during the months of July, August and September, 1930," with a potential production from the whole State of 1,362,000 barrels per day.

In its order of July 24th, 1930 (R., vol. 2, pt. 2, p. 102), the Commission found that the potential production per day from the whole State was 1,400,523 barrels and the market demand 550,000 barrels per day.

In its order of August 30th, 1930 (R., vol. 2, pt. 2, p. 109), the Commission found the potential from the entire State was 1,481,118 barrels per day and that the market demand was 550,000 barrels per day.

In its order of October 28th (R., vol. 2, pt. 2, p. 127), the Commission found "that the daily demand for crude oil from Oklahoma is and will be approximately

550,000 barrels in October, 545,000 barrels in November, and 535,000 barrels in December, 1930," and that the potential production from the State at large during those three months would range from 3,600,000 barrels per day to 4,244,000 (round numbers).

As conclusive evidence that the Commission was prorating and allocating markets the Commission found in its order of October 28th, 1930 (R., vol. 2, pt. 2, p. 132), "that it is necessary to curtail the output from said Class "A" pools 50 per cent of the excess in each pool over and above the average of 5 barrels per well per day and that this curtailment is necessary in order to avoid discrimination as between said Class A pools themselves and as between said Class A pools and the other pools of the State and to prevent waste of crude oil in said Class A pools and to protect the co-equal rights of the producers therein." As a matter of fact, Class A pools had a market for all the oil they could produce and there is no finding to the contrary. In that same order the Commission ordered (R., vol. 2, pt. 2, p. 139) that "Oklahoma oil production shall be limited to an average of approximately 550,000 barrels per day during October, 1930, 545,000 barrels per day during November, 1930, and 535,000 barrels per day during December."

In its order of December 30th, 1930 (R., vol. 2, pt. 2, p. 161), the Commission found "that the rated potential daily production of crude oil from the wells in Oklahoma during the month of January, 1931, is and will be approximately 6,252,219 barrels, and that during the months of February and March, 1931, the said rated

potential daily production will be 6,686,564 barrels and 7,263,077 barrels respectively, and that the daily demand for crude oil from *Oklahoma* during the months of January, February and March, 1931, will range between 465,000 barrels per day in January, which the Commission estimates as the probable demand, and 506,095 barrels per day, which is the maximum potential demand as hereinafter explained." Demand for February and March ranged from 469,000 barrels per day to 500,010 barrels per day.

The Curtailment Act can not validly authorize the Commission to take from one field any part of its market and assign or shift it to another and if the Act is capable of that construction it violates the Fourteenth Amendment in that it takes away from one or more operators in a given field their business without any correspondent advantage, and gives it to another. The Commission *exceeded its powers in shifting or allocating markets.*

## (d) CONSERVATION.

It will be very early said by the defendants, that to permit the producer (in Oklahoma) to run crude oil to *gas-tight steel storage,* within the State, will bring about such physical *waste* thereof, as to warrant in the interest of *conservation* the creation of an elaborate privately endowed system of economic control, with all of its attendant possibilities for favoritism, mistake and punishment for independence of opinion, or failure to contribute thereto, as revealed in this record.

This subtle appeal misled the majority of the lower

court, in that it is found in the majority opinion, as hereinbefore quoted, that:

> "The theory upon which the orders are predicated is that oil from a given pool shall not be produced in excess of the market demands therefor in order to prevent wasteful storage and wasteful use of gas pressure in lifting the oil." * * * Under these circumstances we are of the opinion that the limiting of the taking to the market demands is a reasonable regulation for the prevention of *waste* and the protection of the co-equal rights of the owners of land over such pool" (R., vol. I, pt. 2, p. 226).

Upon the assumption that the majority of the lower court intended from the quoted (*supra*) excerpt of their opinion, to hold the law valid, as a means of enabling the State (in the interest of conservation), through privately apopinted agents, to prevent *above ground storage of crude oil* as physically wasteful thereof, we briefly direct attention to the record in this important connection.

Judge Phillips, who wrote the majority opinion, evidently having the sympathetic thought in mind, during the trial conducted an examination of the witness Slater, which we quote:

> "By Phillips, J.:
>
> Q. What percentage of deterioration is there in the oil from storage?
>
> A. In volume you mean?
>
> Q. Well, as I understand it, if you store oil the lighter vapors are the ones that you lose?
>
> A. Yes, sir.

Q. And that means you lose some gasoline content?

A. Yes, sir.

Q. What percentage of loss is there in gasoline content?

A. Well, in these steel gas-tight storage tanks there is never over one per cent. lost.

Q. That is by volume?

A. Yes, sir.

Q. If you refine that oil immediately you can recover a little more than if you let it stand for a year and then refine it?

A. It would be very small.

Q. Negligible loss?

A. Yes, sir'';

(Rec., vol. I, part 2, pp. 275-276.)

See also the corroborating testimony of an expert witness Jno. H. Wiggins (Rec., vol. I, part 2, pp. 272-273).

Above ground steel storage (except as to cost thereof), was not objectionable to the Commission, in the formative times about which Judge Phillips speaks (Rec., vol. II, part 3, p. 266, paragraph 6).

The *storage above ground* of oil *produced in conformity with proration orders,* without regard to quantity, has never been forbidden or found objectionable by the Commission as *physically* wasteful, whatever the purpose of such storage might have been, and if gas-tight steel storage of crude oil above ground is wasteful, an order making it so (in any quantity) should be entered by the Commission, which the defendants will admit has never been and will not be done.

With regard to Judge Phillips' second conclusion as to the orders being designed to prevent the excessive waste of gas energy in the wide open flush flow of wells, it is but necessary to note that the complained of waste of gas energy is not in the least sense prevented by the orders, but retarded only in time of complete dissipation in the *intermittent* wide open flush flow admittedly permitted by the orders.

The commission have had occasion to consider the matter of the waste of gas energy, and have had some concern about just what was *actually* happening, for in its order of February 10, 1931, by Walker (Chairman), (Rec., vol. II, part 2, pp. 195-196), it finds that

> "Another and an exceedingly important problem, directly connected with the question of physical waste but also bearing upon the question of economic waste and the ultimate recovery of the field, is the *question of natural gas wastage* in connection with the production of crude petroleum. * * *
>
> "Involved in this wastage of *natural gas* to an extent which to the layman's mind *seems criminal* and which to any mind ought to be conceded to be improvident, is the question of the destruction of gas energy."
>
> * * * * * * *
>
> *"There is no evidence that any reasonable amount of study, care or caution has been given by operators generally in the Oklahoma City field to the conservation of this natural gas energy* or the prevention of waste of natural gas in connection with the production of crude petroleum. We should have jurisdiction to

> prevent such waste and to require the preservation of such energy. If there is any weakness in the law in this respect it should be amended."

In view of, and with knowledge of this enormous waste of gas the Commission, although vested with ample authority under the Oklahoma Statutes, has never prescribed any regulation by which an operator may take out his oil by the use of "mechanical devices" for conserving gas pressure in the ground, although a feasible method is pointed out to the Commission by the witness, J. R. McWilliams, as shown by the Commission's findings of February 10th, 1931 (R., vol. 2, pt. 2, p. 196). See Exhibit No. 44, Rec., vol. II, pt. 3, p. 303, a public document with its amazing disclosures which have wholly failed to secure attention from the Commission.

The defendants' witness, E. F. Guidinger (R., vol. 1, pt. 2, p. 349), on cross-examination (R., vol. 1, pt. 2, p. 353) testified that he had "never known of any operator in any field anywhere prior to proration in Oklahoma operating his wells on 2 or 3 per cent of its production."

Plaintiff's witness, H. M. Stalcup (R., vol. 1, pt. 2, p. 276), testified on direct examination (R., vol. 1, pt. 2, p. 277-278):

> "That by gas-oil ratio is meant the volume of gas produced by a given well measured in the ratio of cubic feet of gas utilized to produce a barrel of oil; that in the Wilcox sand the ratio should be not less than 700 nor more than 2,000 cubic feet to the barrel of oil, 700 being the mini-

mum and 2,000 the maximum for ideal production;

"That the least gas-oil ratio in the Oklahoma City field of which the witness has heard, was a matter of 300 or 400 cubic feet to the barrel of oil, as against a high of several hundred thousand feet; that a ratio of several hundred thousand cubic feet of gas to a barrel of oil could most likely be brought about by structural conditions of the producing formation, or improper completion of the well in setting the casing too high, or landing the flow-string in a position in the producing horizon too far above the saturated oil sand, which would allow a great amount of free, dry gas from either a separate sand or a portion of the oil sand, to needlessly enter the flow-string; that in the opinion of the witness, this is cause for the excessive gas-oil ratio that exists in some of the wells in the Oklahoma City field; that such situation can be remedied by following a directly opposite course, that is, landing the flow-string where it should be landed at the top of the oil saturated portion of the horizon, and in some instances the running of a smaller size tubing would partially remedy the effect; but such reconditioning will not help an extreme case of several hundred thousand cubic feet per barrel;

"That the Skelly Oil Company has produced one of the largest wells in the Oklahoma City field upon a gas-oil ratio of approximately 500 cubic feet of gas to the barrel of oil; that such result was accomplished by carefully coring at the top of the horizon in which it expected to produce oil, analyzing the sand samples, attempting to set its pipe at a point or level which

would be proper to produce all of the oil capable of being produced by the well, with a minimum of gas, and by casing off the 'gassy' formations; that the well referred to was the John Herd Well No. 1; that the gas flow of that well increased to sixty million cubic feet, and nevertheless there was maintained a gas-oil ratio therein of not to exceed 900 cubic feet of gas in the production of a barrel of oil; so that in an identical case a well of that tremendous capacity, if properly handled and the procedure be followed which has been here outlined, a proper gas-oil ratio of not to exceed 900 or 1,000 cubic feet per barrel can be maintained."

On re-examination the witness testified (R., vol. 1, pt. 2, p. 278) that "gas-oil ratio is important regardless of how the well is operated and becomes of more importance in that by holding the gas back you thereby conserve the energy of the gas and take full advantage of its use; that low gas-oil ratio is one of the most important things in producing oil regardless of whether you are producing under proration or otherwise."

Dr. Arnold testified (R., vol. 1, pt. 2, p. 327) that in his opinion "the unrestricted pinching in of a well to say, 2% of its potential, has an injurious effect upon the well" and that he was "unable to say what would be the best percentage of the total production at which the wells could be operated, but would say off-hand from practical experience, that somewhere between 33⅓% and 66⅔% would probably be about the best."

Under the Statutes of Oklahoma the Commission had ample authority to do all the things required by the

California statute upheld by this court in *Bandini Petroleum Co. v. Superior Court*, —— U. S. ——, decided November 23rd, 1931.

Thus, by the Act of the Oklahoma Legislature approved March 30th, 1915 (1915 Session Laws, 326, Secs. 7922-7923, Okla. C. St. 1921), Appendix G, pp. 196-201, inc., the Commission was given "authority to require the conservation of said gas in accordance with the provisions of this act; and, provided, further, the gauge of the capacity of any gas well shall not be taken until such well has been allowed an open flow for a period of 3 days." This power is given "whenever natural gas in commercial quantities, or a gas-bearing stratum, known to contain natural gas in such quantity, is encountered in any well drilled for *oil or gas* in this state" and can not be utilized without waste. The statute under such circumstances requires that the "gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating waters"; also "any unrestricted flow of natural gas in excess of two million cubic feet per 24-hour day should be considered a commercial quantity thereof." The 4th Section of the act provides that "The said Commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to *regulate* the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce

therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another." The Act provided for hearings before the Commission and conferred ample power upon the Commission to prescribe rules for the conservation of the gas in the Oklahoma City field and protect the co-equal rights of the surface owners without the necessity of an arbitrary rule compelling oil wells to remain shut in for 65 days at a time or prohibiting them from producing over 2 to 6 percent of the potential capacity of their wells. The Commission had ample power under the gas conservation act to require the installation of mechanical devices on oil wells so as to accomplish all the purposes provided by the California statute in the Bandini case and yet up to date the Commission has never undertaken to prescribe any such rules or regulations. It is thus clear that the Commission has been concerning itself with maintaining prices and has endeavored to disguise price fixing under rules *"protesting"* the probable storage of oil in earthen tankage or other physical waste.

J. R. McWilliams, defendants' witness (R., vol. 1, pt. 2, p. 339), a petroleum engineer for the Skelly Oil Company, of which Mr. W. P. Z. German, leading counsel for the defendants in this case, is general counsel, testified on cross-examination (R., vol. 1, pt. 2, p. 346) "No man will drill an oil well unless he thinks he will get his money back" and (R., vol. 1, pt. 2, p. 348) further, that "I have never known of producers pinching in their wells and keeping them pinched in as a practice where there was a good price for the oil. I think

the policy in the past has always been to produce them at maximum capacity."

Judge Kennamer's dissenting opinion (see R., vol. 1, pt. 2, p. 242) strips the mask from these rules in the following pointed and terse language:

> "Defendants point to the enormous waste of gas and casing-head gas in the Oklahoma City field and introduced D. B. Dow as a witness who testified that at a valuation of six cents a thousand the total value of gas and gasoline wasted during the year would be $29,400,000.00 if the field were opened up. But the Commission had made no order requiring the producers to operate their wells on such gas-oil ratio as will conserve the gas. The Commission's orders have been directed at the suppression of the production of oil. During oral argument it was stated by counsel, and not denied, that the record before the Special Master shows that one 18-barrel oil well is operated under the Commission's rules in the Oklahoma City field at an expenditure of over 3,000,000 cubic feet of gas per barrel. The Commission must therefore either have construed Section 7964 of the Oklahoma Comp. Stats, 1921, as authorizing the waste of gas without restriction when produced from an oil well, or otherwise has refused to enforce the statute passed in 1915 embodied in Sections 7920 to 7922, inclusive, of the Oklahoma Comp. Stats. 1921, prohibiting the production of natural gas in such manner and under such conditions as constitute waste and providing that 'whenever natural gas in commercial quantities or a gas bearing stratum, known

to contain natural gas in such quantity, is encountered in any well drilled for oil or gas in this state, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating waters.' Not having taken any steps to conserve the gas as authorized and directed by the Oklahoma statutes of 1915, embodied in Sections 7920 to 7922, Oklahoma Comp. Stats. 1921, my conclusion is that the Commission has not concerned itself with conservation of the natural resources but with the suppression of the production of oil in order to decrease the supply and thus increase the price."

## INTERSTATE COMMERCE.

**The rules and regulations of the Commission are void in that they interfere with and constitute a burden upon interstate commerce.**

(NOTE: This question is raised by the 7th, 9th and 31st assignment of error. R., vol. 1, pt. 2, pp. 381, 383 and 387.)

In 1930, Oklahoma produced 24% of the nation's oil, and with California (25%) and Texas (32%), yielded over 80% of that total, and with Kansas, Arkansas, Louisiana and Wyoming, produced 97% of that total.

*Conservation*, by Ray Lyman Wilbur, Government Printing Office, 1931, pp. 85 and 86.

The Commission in its order of October 28th, 1930 (R., vol II, pt. 2, p. 135), found "that from 65% to 75%

of the crude oil *sold from the wells* in Oklahoma is sold to refiners and purchasers who take it outside of the State of Oklahoma." *"Sold from the wells"* is a finding that the oil goes from the wells *directly* into interstate commerce.

That its orders limiting production actually burden interstate commerce and were so intended by the Commission see provisions carried through all the orders prohibiting "all purchasers and carriers of oil in the State of Oklahoma * * * are hereby forbidden to purchase or carry oil *produced in violation* of these orders." (R., vol. 2, pt. 2, pp. 100-106-115-141-174-206.)

This was a direct embargo on the interstate carriage of crude oil, except as limited by the proration orders.

In *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 51, 66 L. Ed. 462, this court held unconstitutional a statute of North Dakota, which provided for grain inspection and gave the state inspector the authority to fix the profit at which the grain was sold, and in the language of the court constituted a "comprehensive scheme to regulate the buying of grain." The statute was held to be violative of the commerce clause of the Federal Constitution. The court therein said:

> "* * * The record discloses that North Dakota is a great grain-growing state, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota, to be shipped to and sold at terminal markets in other states, the principal

> markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant."

The above case and the case of *United States* v. *Patten*, 226 U. S. 540, *supra*, show that where a basic commodity is concerned, upon which the entire nation depends for its supply, no restriction has been allowed by this Court upon the free and competitive marketing of said commodity.

The above case also effectively answers the opinion of the majority of the court below, which states:

> "The principle is too well settled to require citation, that the Congressional power of regulation attaches only when interstate transportation has begun."

The trial court's findings (R., vol. 1, pt. 2, p. 178, etc.) show that plaintiff does a large business in 15 states other than Oklahoma; that its refinery capacity is 18,000 barrels per day; that it owns 263 retail gasoline stations and 256 wholesale gasoline stations in six states, *and that from 65 to 70 per cent* of its refined products are sold in states other than Oklahoma; that the producing of oil is an adjunct to its refinery and that plaintiff has built up a business unit carrying on trade and commerce between the several states. It is not necessary to show an actual prohibition of interstate commerce in order for the rules to constitute a burden thereon. Neither is it necessary to show an express intent to regulate or burden interstate commerce. But the Commission showed its intent to do so, by its Embargo order cited above. (It is true

that ordinarily the mining of coal or producing oil is not interstate business although the products may find their way into interstate trade. Here though we have a business unit long operating in interstate commerce before these rules were prescribed.)

The Commission in its order of June 30th, 1930 (R., vol. 2, pt. 2, p. 86), found that "the potential production of crude oil in the United States is at this time approximately 4,730,000 barrels per day, and imports of crude and refined petroleum aggregate about 300,000 barrels per day, thus creating a total possible current supply of 5,030,000 barrels per day as against an approximate daily demand for domestic use and export of 2,840,000 barrels per day."

In the Commission's order of December 30th, 1930 (R., vol. 2, pt. 2, p. 160), it found "that the potential production of crude oil in the United States is at this time approximately 10,000,000 barrels per day, and imports of crude and refined petroleum aggregate about 300,000 barrels per day, thus creating a total possible current supply of 10,300,000 barrels per day as against an approximate daily demand for domestic use and export of 2,500,000 barrels per day." In the same order (R., vol. 2, pt. 2, p. 161) the Commission found that "the rated potential daily production of crude oil from the wells in Oklahoma during the month of January, 1931, is and will be approximately 6,252,219 barrels" and for February and March, 1931, 6,686,564 barrels and 7,263,077 barrels, respectively.

On that basis the potential of Oklahoma was more than 60 per cent of the entire potential of the United

States, and the Oklahoma City field alone has a producing capacity equivalent to one-fifth of the entire production of the United States. This is shown by the Commission's orders above referred to and the order of October 28th, 1930 (R., vol. 2, pt. 2, p. 125), and the order of February 10th, 1931 (R., vol. 2, pt. 2, p. 205), changing the formula for determining the Oklahoma City potential. Under the new formula the Commission finds that the Oklahoma City field has a capacity in excess of 2,000,000 barrels per day and that basis gives Oklahoma City approximately one-fifth of all the production in the United States.

If the effect of the rules is to limit substantially the amount of a product entering into or its price in, interstate markets, then the act is an interference with interstate commerce. (*United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 407.)

On the second appeal (Coronado Coal Company case, 268 U. S. 295) Chief Justice Taft pointed out that the former judgment that the restraint was not an interference, had been based on the fact that the potential production of the mines involved could not materially affect the amount of coal moving into interstate commerce. "We declined to hold," he said in the second opinion, "that the mere elimination from interstate trade of 5,000 tons a week which we took to be the practical limit of capacity of the mines of plaintiffs, was significant in the total tonnage of the country or state, or that its stoppage furnished a basis of itself for infering a palpable and intentional restraint of interstate trade."

This statement of the Court brought the question—"When is the production of a commodity within the commerce clause?"—out of the realm of legal speculation and into that of reality. The fact that the potential capacity of the mines was shown to be 5,000 tons a day, instead of 5,000 tons a week made the "moving purpose" of District 21, one of the defendant unions, to prevent production for shipment to neighboring states, "a restraint on interstate commerce."

"The mere reduction in the supply of an article to be shipped in interstate commerce," said Chief Justice Taft, in the second opinion "by the illegal or tortious prevention of its manufacture or production, is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering or moving in interstate commerce or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act." See *Bedford Cut Stone Co.* v. *Journeymen, S. C. Assn.*, 274 U. S. 37.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, the Court said that "the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from *invidious* restraints, to prevent interference through conflicting or hostile State laws, and to insure uniformity in regulation. *It means that in the matter of interstate commerce we are a single nation—one and the same people.*" (Italics ours.)

As said by Mr. Chief Justice Taft in *Stafford* v. *Wallace*, 258 U. S. 495, plaintiff's refinery is "not a place of rest or final destination" of the oil, it being but "incidental to the current" from one State to another.

It is obvious therefore, that the direct effect of the Commission's orders and their enforcement is to interfere with what is designated by Mr. Chief Justice Taft in *Stafford* v. *Wallace*, 258 U. S. 495, as "constantly flowing traffic" in interstate commerce.

In *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, this court held that the Act of the Oklahoma Legislature prohibiting exportation of gas out of the State violated the interstate commerce clause of the National Constitution and was therefore void. If the State can not prohibit the exportation of gas, then how far can it go in suppressing the ability to export oil produced in the State?

*Pennsylvania* v. *West Virginia*, 262 U. S. 553, involved the validity of a West Virginia Act by which it sought to conserve its natural resources—gas—for the health and comfort of its citizens by requiring that gas produced in the State be first applied to the satisfaction of domestic consumers before it could be transported beyond State lines. This court held the Act must fall under the commerce clause, saying that "A State law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission, is a regulation of interstate commerce—a prohibited interference."

In *Board of Trade* v. *Olsen*, 262 U. S. 1, the Court referred to *Swift & Co.* v. *United States*, 196 U. S. 375,

as a "milestone in the interpretation of the commerce clause of the Constitution" and said that by the ruling in that case "It refused to permit local incidents of great interstate movement, which, taken alone, were intrastate, to characterize the movement as such."

*Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, and *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, are important decisions on this question.

*Stafford* v. *Wallace,* 258 U. S. 495, 66 L. Ed. 735, involved the constitutionality of the packers and stockyards act passed by Congress insofar as that act provided for the supervision by federal authority of the business of commission men and livestock dealers in the great stock yards of the country.

It was urged that the attempted regulation was invalid because the manner of dealings of the commission merchants and dealers at Chicago was no part of interstate commerce. Mr. Chief Justice Taft holding otherwise said:

> "The object to be secured by the Act is the *free and unburdened flow* of live stock *from the ranges and farms of the west* and the southwest through the great stockyards, and slaughtering centers on the borders of that region, and thence, in the form of meat products, to the consuming cities of the country in the middle west and east, or still as live stock, to the feeding places and fattening farms in the middle west or east, for further preparation for the market. • • •
>
> "The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots,

and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the west to the east, and from one State to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the west; its ultimate destination, known to, and intended by, all engaged in the business, is in the middle west and east, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce."

In the last cited case, in response to the contention that packers were not engaged in interstate commerce at the time of the supervision by the federal authorities at Chicago because the transportation of the cattle had completely ended—in response to the argument that a technical construction of what constitutes interstate

commerce should be applied—the Court referred to the Swift case and quoted its language that "commerce among the States is not a technical legal conception but a practical one, drawn from the course of business," and said:

> "The application of the commerce clause of the Constitution in the Swift case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another, which are ever flowing are, in their very essence, the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream, and take it out of complete national regulation *by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.*"

In *Henderson* v. *Wickham*, 92 U. S. 273, 23 L. Ed. 549, the Court held unconstitutional as a regulation of interstate commerce a statute of New York which imposed "a burdensome and almost impossible condition on the ship-master as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each."

## ANTI-TRUST LAWS.

**(1) The Commission's rules and regulations limiting production are in excess of the Commission's powers, and void because the Commission has no authority to accept or assume the functions of a committee or association for the purpose of fixing prices or lessening "the production or sale of any product or article of commerce, or the use or consumption of the same, or to prevent, restrict, limit or diminish the manufacture or output of any such article of commerce, use or consumption."**

(NOTE: This question is raised in the 28th paragraph of Plaintiff's Third Amended and Supplemental Bill (R., vol. I, pt. 1, p. 26) and by the 8th (R., vol. I, pt. 2, p. 381-382), 9th and 10th (R., vol. I, pt. 2, p. 383), 11th (R., vol. I, pt. 2, p. 383), 14th and 20th (R., vol. I, pt. 2, p. 384-385), and 28th (R., vol. I, pt. 2, p. 387) assignment of errors.)

If the rules and regulations are in excess of the Commission's power insofar as they undertake to suppress the production of oil, then we are entitled to an injunction under *Herkness* v. *Irion*, 278 U. S., 92-96, without regard to the constitutionality of the Act.

*West* v. *Kansas Nat. Gas Co.*, 221 U. S. 229, 55 Law Ed. 716.

See:

*United States* v. *Patten*, 226 U. S. 540, 57 Law Ed. 341;

*Henderson* v. *Wickham*, 92 U. S. 273, 23 Law Ed. 549.

**(2) The Commission had no power to interpose itself as a shield between the operators and purchasers on the one side and the Anti-Trust laws on the other—the Commission had no power to legitimate any such agreement or conspiracy by adopting it and making it what appeared to be its own.**

The American Petroleum Institute sponsoring proration adopted through its committee at Houston, Texas, on March 16, 1929, a resolution proposing an agreement to limit production and addressed a letter to the Chairman of the Federal Oil Conservation Board seeking assurance that such partes, so agreeing, might be relieved from the operation of the Acts of Congress forbidding agreements in restraint of interstate commerce.

The Attorney-General gave the following reply to the Board upon its having presented the inquiry to the Attorney-General:

OFFICE OF THE ATTORNEY-GENERAL,
Washington, D. C.

March 29, 1929.

"Honorable Ray Lyman Wilbur,
Secretary of the Interior,
Washington, D. C.

My dear Mr. Secretary:

I have the letter of March 20th written by you as Chairman of the Federal Oil Conservation Board, enclosing a copy of a resolution adopted by a committee of the American Petroleum In-

stitute at Houston, Texas, on March 16, 1929, proposing that those engaged in the production of petroleum agree to limit production in certain areas in 1929 to the amount produced in 1928 provided that such action be first approved by the Federal Oil Conservation Board and by the authorities in the States affected.

The questions you submit for my opinion are whether the Federal Oil Conservation Board has power to approve the proposed agreement and what, if any, effect such approval might have in relieving the parties to the proposed agreement from the operation of Acts of Congress forbidding agreements in restraint of interstate commerce. You also inquire whether the proposed agreement would violate the Anti-Trust laws of the United States.

The Federal Oil Conservation Board was constituted December 19, 1924, by an Executive Order naming the Secretaries of War, Navy, Interior and Commerce. There was no Act of Congress then in force defining the duties and powers of the Board and there has been no legislation since, dealing with the Board, excepting appropriation Acts, commencing with the Act of January 20th, 1925, appropriating funds for the expenses of the Board.

It is clear that Congress has not given the Board any power to grant to any persons immunity from the operation of Acts of Congress prohibiting agreements in restraint of interstate commerce and that the Board has no authority to approve any action which is contrary to an Act of Congress or to the Anti-Trust laws of any State; and that no action taken by the Board would have the effect of relieving parties to such an agreement from the operation of the Anti-

Trust laws of the United States and of the States. The proceedings of the American Petroleum Institute indicate that the purpose of submitting the proposed agreement to the Federal Oil Conservation Board for approval is to obtain a sanction from the Federal Government which may operate to make the parties to the agreement immune from the operation of the Anti-Trust Laws. For the Federal Conservation Board to grant approval under such circumstances would be assuming authority which it does not have.

The Board's only duties are to investigate and study for the purpose of recommending methods of conservation, and not with the intent that its action in approving or disapproving any plan would have any legal effect on the validity of the plan proposed. As the powers of the Board are limited in this way, the question whether the proposed agreement would violate the Anti-Trust Laws of the United States is apparently not a question arising in one of the Executive Departments on which the Attorney-General is authorized by law to give an opinion. Furthermore, it is not the practice of Attorneys-General to give opinions as to whether proposed action by private persons would violate the laws of the United States.

However, to avoid any misunderstanding as to the attitude of this Department, it is not out of place to say that any proposal to limit production with its consequent effect on Interstate Commerce would receive immediate scrutiny from this Department, with a view to taking such action as the facts and the law would warrant. The proceedings of the Petroleum Insti-

tute make it clear that its members already realize that under existing laws such an agreement could not safely be made without the sanction of some officials of the United States authorized to give it and, as I have already pointed out, no such authority exists.

In the absence of some new legislation by Congress providing for removing such an agreement from the operation of the Anti-Trust Laws, it does not seem practicable to bring about conservation through the medium of such an agreement.

Respectfully yours,

WILLIAM D. MITCHELL,

*Attorney-General.*"

The Corporation Commission of Oklahoma unfortunately did not have the benefit of this opinion which was given to the Federal Oil Conservation Board.

See also—Conservation by Ray Lyman Wilbur—Government Publication 1931, p. 94. We quote from the Secretary of the Interior's book:

"Producers of oil assembled in convention in Houston, Tex., passed resolutions which proposed that oil production for 1929 be limited by them to that of 1928. They came to Washington and asked the approval of the Federal Oil Conservation Board to this plan for action by the industry to limit production. That Board asked the Attorney-General if it had the authority to grant such an approval. The Attorney-General said that the board had no such powers and that the request would not have been made had those making it not realized that 'under existing laws such an agreement could not safely be made

without the sanction of some official of the United States. * * *'' The producers' way out was thus blocked.''

This case falls within the rule announced by the Texas Civil Court of Appeals in *San Antonio Gas Co. v. State,* 54 S. W. 289, holding that it is competent to prove ''that such legislation was sought and obtained in the furtherance of an unlawful design—to restrain trade and stifle competition.'' In that case defendants had obtained a city ordinance extending franchises in furtherance of the design to restrain trade and stifle competition. The court said:

> ''There is no merit in the contention that the pleadings of appellee should have been held insufficient which alleged the different corporations combined to procure legislation from the city council of San Antonio. It was perhaps unnecessary to plead that fact, as it was a circumstance that, with others, established the combination in violation of the statute. It is clearly the right of corporations to apply to legislative bodies for legislation in their behalf, and it is clearly the right of the state to prove that such legislation was *sought and obtained* in the furtherance of an unlawful design—to restrain trade and stifle competition. It was a circumstance, like any other, to be proved in order to establish a combination in violation of the laws of Texas. The information not only alleged the intention to combine, but that the combination was carried into effect through the ordinance obtained from the city council of the city of San Antonio.''

In the Commission's order of June 30th, 1930 (R., vol. 2, pt. 2, p. 85-93), it recites that:

> "The Commission also finds that in the making of said schedule in paragraph (f) the *producers and purchasers* in all of said pools were consulted and meetings of all of said *producers and purchasers* were held at which all of the foregoing factors were considered and that said schedule represents the consensus of opinion of said *producers and purchasers* as to reasonableness of arrangement, necessity and convenience of *producers and purchasers* and equity as between the various common sources of supply, and was agreed to by all producers and purchasers except one." (Italics ours.)

The Commission's orders are based upon and are an inseparable part of a combination in violation of the Anti-Trust laws.

The testimony of Chesebro, Assistant Treasurer of the Carter Oil Company (R., vol. 1, pt. 2, p. 300), Plaintiff's Exhibit 15 (R., vol. 2, pt. 1, p. 9), and Plaintiff's Exhibit 21 (R., vol. 2, pt. 1, p. 30) conclusively show that the operators had entered into a combination to "lessen the production" and sale of crude oil and "the use or consumption of the same" in violation of the Anti-Trust laws, and that the Commission, in excess of its power and authority, was acting as a "committee" for the operators "with the intent or effect to limit or fix the price" of crude oil and "lessen the production or sale of" crude oil and its "use or consumption."

Plaintiff's Exhibit 15 states the names of the contributors to this fund out of which Collins' salary and expenses, aggregating $95,181.39, was paid for the period from November 1st, 1929, to January 1st, 1931. The witness did not have the names and amounts contributed from January 1st, 1931, to the date of trial. Plaintiff's Exhibit 15 shows that during that period the Carter Oil Company contributed $9,324.41; the Gypsy Oil Company (subsidiary of the Gulf Oil Company), $10,315.26; the Magnolia Petroleum Company, $6,013.77; the Mid-Continent Petroleum Corporation, $4,561.20; the Prairie Oil & Gas Company, $9,127.14; The Pure Oil Company, $4,508.63; the Shell Petroleum Corporation, $4,555.55; Sinclair Oil & Gas Company, $8,333.45, and The Texas Corporation, $2,497.77.

Any New York Stock Exchange manual will show that six of these companies have par value stock outstanding aggregating a capitalization of over $1,169,331,560.00, to-wit:

| | |
|---|---|
| The Pure Oil Company | $88,959,250.00 |
| Prairie Oil & Gas Company | 61,035,800.00 |
| Barnsdall Oil Company | 82,422,575.00 |
| Skelly Oil Company | 25,208,000.00 |
| The Texas Corporation | 246,278,775.00 |
| Standard Oil Company of New Jersey | 637,961,700.00 |
| Houston Oil Company | 27,465,460.00 |
| | $1,169,331,560.00 |

This does not take into consideration the following contributors to the proration funds, with a capital

stock of no par value, to-wit: Sinclair Oil & Gas Company; the Magnolia Petroleum Company, subsidiary of the Standard Oil Company of New York; the Empire Oil & Gas Company, subsidiary of the Cities Service Company; Twin State Oil Company, subsidiary of the Sun Oil Company; Mid-Kansas Oil & Gas Company, subsidiary of the Ohio Oil Company; Gypsy Oil Company, subsidiary of the Gulf Oil Company; Houston Oil Company, and Phillips Petroleum Corporation.

These companies control the production of crude oil in the Mid-Continent field, and by themselves and through their subsidiaries dominate the oil industry in Oklahoma and Texas, in which two states there is produced 56% of the total production of the United States.

A company engaged in the business of producing, refining, transporting and marketing crude oil and its products, is identified in the industry as an *integrated* company, as distinguished from the company engaged in the production of crude oil only, classified as a *non-integrated* company (R., vol. 1, pt. 2, p. 183). A *natural* advantage (the result of geography, business policy and incidental investment) exists in favor of the *integrated* Oklahoma company, in the cost of manufacturing its raw materials (crude oil so produced) into refined products for marketing. Proration is wholly designed to destroy such *natural* advantage, and create in its stead an artificial advantage to the independent *non-integrated* Oklahoma Company, as well as to the *non-integrated* company affiliated in ownership or control with *integrated* refining interests outside Oklahoma, by requiring the *inte-*

*grated* company in Oklahoma to leave its crude oil in the natural reservoir (in the pretended interest of conservation of natural resources), and purchase for its refining needs crude oil produced by the independent *non-integrated* company and/or the *non-integrated* company affiliated by ownership or control with the *integrated* refining interests outside Oklahoma.

In other words, the use of crude oil which may be produced by the so-called *integrated* (in Oklahoma) company upon its properties, to the extent of its actual refinery needs (without physical waste in any sense), is defined by the lower court to be *economic waste* within the meaning of the statute in question, and should be prohibited; *while to wholly purchase the identical needs of such refinery from one's neighbor* (integrated outside of Oklahoma) *in the same producing area* (at whatever price may be demanded) *results in conservation of the natural resources of the State.*

The theory of the defendants in substance is, that it would be an *economic* waste of a natural resource for the *integrated* (in Oklahoma) company to be permitted to manufacture its crude oil into gasoline to be used in industry upon an available market, while to purchase such crude oil to be so manufactured from the *non-integrated* producer (as above defined within that classification) results in conservation of that natural resource, notwithstanding, perchance, the use of the refined product might be subjected to the most trifling and non-useful purpose.

"During the argument by Ex-Attorney General Charles West, Special Counsel for the

Governor of the State of Oklahoma in this case, Judge Kennamer, referring to a brief Mr. West had filed in this case, said to Mr. West: 'I get the impression you thought the law was being administered under monopoly at this time. This is what I want to find out.' To which Mr. West replied: 'You get the right idea.' Thereupon Judge Kennamer again addressed Mr. West as follows: 'That is right, is it?' To which Mr. West replied: 'I think the administration of this law by the Umpires appointed by the oil companies is iniquitous, and we have asked them to change it, and if they don't change, I think they will be compelled to.' Judge Kennamer: 'That is a very important matter.' To which Mr. West replied: 'I think it is, but it does not destroy the law.'" (*R., vol. I, pt. 2, p. 371*).

The distinguished former Attorney General, Mr. West, rightfully referred to the administration of the law as iniquitous.

## Conclusion.

We respectfully submit that:

(*a*) The Act is unconstitutional and void;

(*b*) The Orders, Rules and Regulations of the Corporation Commission promulgated for the enforcement of the Act, are unconstitutional and void;

(*c*) The decree of the lower court, except as to the void penalty sections, should be reversed, and an order entered permanently enjoining the defendants herein from enforcing the said Orders, Rules and Regulations

against this plaintiff and others similarly situated, and from hereafter entering any similar orders, rules and regulations under the authority of the said Act;

(*d*) The decree of the lower court with respect to the void penalties of said Act be affirmed, and

(*e*) The bond required of the plaintiff by the lower court in its order of June 13, 1931, be canceled and the plaintiff and its surety stand discharged from further liability thereunder.

Respectfully submitted,

JAMES M. BECK,
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## APPENDIX A.

### History of the Times When Statute Enacted Pertinent in Construction Thereof.

In *United States* v. *Union Pacific R. R. Co.*, 91 U. S., 72; 23 L. Ed. 228, this court said:

> "But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."
>
> *Chicago, R. I. & P. R. Co.* v. *Gist*, 79 Okla. 8-14;
> *Rector of Holy Trinity Church* v. *United States*, 143 U. S., 457;
> *DeGraffenreid v. Iowa Land & Trust Co.*, 20 Okla., 716;
> *Davidson* v. *Gibson*, 56 Fed., 446;
> *People* v. *Supervisors of Columbia Co.*, 43 N. Y., 130;
> *United States* v. *Oregon & C. T. Co.*, 57 Fed., 426.

In view of the above rule, the fact that the Corporation Commission repeatedly undertook to fix the price of crude oil prior to the passage of the Curtailment Act in February, 1915, is important as tending to show the purpose of the Act.

Thus during the month of September, 1914, the Commission entered its Order No. 844 (R. vol. 2, pt. 3, p. 246):

"* * * that the Prairie Oil & Gas Company, the Gulf Pipe Line Company, and the Texas Company *shall not* reduce the price of crude oil below seventy-five (75) cents per barrel * * *"

and thereafter, on September 22nd, 1914, entered its Order No. 846 (R., vol. 2, pt. 3, pp. 247 to 264, incl.), concluding that

"Oil of the gravity and grade of the Cushing oil and the average oil of Northern Oklahoma should not be taken from the ground at a time when it could not be sold at a minimum price of 75 cents per barrel, hence 75 cents per barrel will be the standard now adopted by the Commission, and any oil taken from the ground under conditions and circumstances that would not produce 75 cents per barrel, will be considered as against public policy and against the best interests of the state. The Commission cannot issue an order preventing the common purchasers from paying less than 75 cents per barrel for oil unless the oil can be retained in the ground until the market conditions justify the taking of it therefrom.

"It is hereby ordered, that all producers shall not take more oil from their wells than can be sold upon the market at 65 cents per barrel, or *stored in regulation steel tankage*, until the first day of October, 1914; that the rules and regulations for the curtailing of production will be considered by the Commission at the hearing on September 28th, at which time it will be determined how long the price shall continue at 65 cents per barrel, with a view of raising the same to 75 cents per barrel, the

basis of which the Commission has found to be just *to prevent waste.* The Commission will also consider rules and regulations with reference to storing oil with a view of limiting the storing to a minimum amount.

"It is further ordered, that no common purchaser or other purchaser of crude oil in the State of Oklahoma shall buy oil at a price less than 65 cents per barrel until further ordered by the Commission.

"For the hearing of September 28th, the Commission suggests that the business interests, including the oil producers as well as other affiliated interests, give full consideration to the plan outlined, that is, the curtailing of production to the reasonable market demands and in what manner this can best be done, that the Commission may have the benefit of their business judgment. The Commission can give but little consideration to opinions based upon self interests alone, but invites a consideration of the subject from a broad public and business standpoint with that iron will of determination that characterized Andres Jackson."

In the interim after the entry of Order No. 846, *supra,* and prior to October 1st, 1914, the Commission entered its Order No. 846-A (R., vol. 2, pt. 3, p. 244), to the effect that, Order No. 846, *supra,*

"* * * issued by this Commission on the 22 day of September, 1914, fixing the price at which oil could be produced and at which it could be purchased at 65 cents, is temporarily suspended until further order of the Commission, and no corporation, firm or individual shall take

> oil from the oil sands of Oklahoma when same cannot be sold at a price not less than 55 cents, and no individual, firm or corporation shall purchase oil in Oklahoma at a less price than 55 cents until further order of the Commission."

and,

On October 1st, 1914, entered its Order No. 847 (R., vol. 2, pt. 3, p. 243) that,

> "* * * no producer in the Healdton field shall take any oil from the oil sands of that field, for sale, at a price less than 50 cents per barrel until such time as the conditions can be fully investigated by the Commission, and no common purchaser or other person shall purchase oil hereafter taken from the oil sands of the Healdton field at less than 50 cents per barrel until such time as the Commission can hear and determine the necessities for the less price.
>
> "All parties having storage oil are hereby notified that if the same is sold at less than 50 cents per barrel without permission of the Commission after an investigation as to the quality of the oil, same will be prorated against their runs through the pipe lines."

Low prices for crude oil moved the Legislature to enact the Statute. When the price is high neither the Commission nor the producers have invoked this Statute, and it is important to observe, that:

Order No. 846, (R. vol. 2, pt. 3, p. 263, Sept. 1914) fixed the price of oil at 75¢ per barrel, and further recited that the best remedy for the low price condition would be obtained

> "by partially closing the wells and only producing enough oil therefrom to supply the present demands at a reasonable price,"

citing the case of *Ohio Oil Company* v. *Indiana*, 177 U. S. 200, as authority for so doing.

In the supplementary Order (R., vol. 2, pt. 3, p. 245, No. 846A) the Commission reiterated that the solution of the price problem

> "was a reasonable limitation of the production, that is, protecting one producer against the other,"

and that therefore,

> "until a reasonable price of 75¢ per barrel for oil can be obtained, oil should not be produced in quantities *in excess of the reasonable market demands.*"

Thus was the term "*reasonable market demand*" conceived, first used, and by context fully defined as *demand at a satisfactory price.* This term a short time later, became a part of the law here in question, and now forms the backbone of all Orders of the Corporation Commission.

The Commission apparently recognized that such curtailment would actually harm the producing sands, for the Order recited that the curtailment would be effected

> "with the least possible injury to the wells."

As the overproduction was only temporary, the Commission was not enabled to put its proration plan into

effect; but three months later, immediately after the Legislature convened, the Curtailment Act was enacted so as to put into effect the plan outlined by the Commission in its Order No. 846A, above described.

Section 2 of the Curtailment Act, embodies the direct price-fixing plan prescribed by the Commission in the above orders, and Section 3 embodies the indirect price-fixing plan; that is, the shutting in of production to the

"reasonable market demands."

As shown by the history of the period, the evil aimed at by both the direct and indirect method, was the low price situation caused by temporary overproduction.

On February 18th, 1916, the Commission entered its Order No. 1022 (Rec., vol. II, part 3, p. 264), which should be read in its entirety as evidencing the earliest construction of the Act in question, and emphasis must of course be given to the all-important following portion (Rec., vol. II, part 3, pp. 268 and 269) of that Order:

> "* * * Chap. 25, Session Laws of 1915, *specifically prescribes the jurisdiction of the Commission for fixing the price of the commodity.* It does not give the Commission jurisdiction to fix a price based upon extortion or waste, *but prescribes the conditions upon which the Commission may fix a price for crude oil.*
>
> "The Commission finds the evidence in this case to be insufficient upon which to base a conclusion as to the value of crude oil based upon the selling price of refined products. At the time the complaint was filed, oil in the Healdton field

was selling at 35 cents per barrel. It is now (outside of the record) selling at from 75 cents to $1 per barrel. The by-products fluctuate in price, whether because of increased demand or because the price may be influenced by monopoly may not in all instances be easily determined. If the price of the by-products should be advanced at some time when the demand was greater than others, under the theory of this law the price of crude oil would be advanced, and it would make it impossible to reduce the price of the refined product, and have the effect of increasing the refined products to the consuming public, when the relation between the crude oil and refined oil was established by the Commission, if such a thing were possible.

"Without going into all the details of the evidence with reference to the relative value of the Healdton oil with other oils, we are of the opinion that the fixing of a price of crude oil under Sec. 2 of this act is absolutely impossible and impracticable. The complaint is therefore dismissed."

The legislation thereafter remained, for almost *eleven* years, a dead letter statute, without appropriation, *public* or *otherwise*, for its enforcement, throughout the greater part of which period, however (as now defined by the defendants), Oklahoma was *wastefully* producing great quantities of crude oil upon a *highly satisfactory market demand.*

## APPENDIX B.

### Plaintiff's Assignment of Error.

(R., vol. 1, pt. 2, p. 379.)

Plaintiff, in its assignment of errors, says that the court below erred:

(1) In holding and decreeing that the Act of the Oklahoma Legislature approved February 11, 1915, entitled "An Act defining and prohibiting the waste of crude oil or petroleum, providing for the equitable taking of the same from the ground and conferring authority on the Corporation Commission, prescribing the penalty for the violation of the Act and declaring an emergency", embodied in Sections 7954 to 7963, inclusive, Oklahoma Compiled Statutes of 1921, hereinafter denominated "Curtailment Act", is not in contravention of the Fourteenth Amendment to the National Constitution in that it deprives the Plaintiff of its property without due process of law.

(2) In failing to hold and decree the said Curtailment Act in contravention of the Fourteenth Amendment to the National Constitution in that it is too uncertain and indefinite to confer upon the Corporation Commission of the State of Oklahoma power and authority to make the orders, rules and regulations Plaintiff complains of in its Third Amended and Supplemental Bill and/or to make rules, regulations and orders of any effect beyond the prevention of the actual physical waste of crude oil in the production thereof in the State of Oklahoma.

(3) • • •.

(4) In failing to hold and decree the Curtailment Act in contravention of the Fourteenth Amendment to

the National Constitution in so far as it undertakes to empower the Corporation Commission to make rules and regulations prohibiting the Plaintiff and others similarly situated from extracting from its leases and/or their leases in the Oklahoma City oil field and other fields in the State of Oklahoma, all the oil its wells will produce without the application of artificial energy, so long as the Plaintiff has facilities for the customary and usual refining and marketing utilization of such oil so produced.

(5) In failing to hold and decree the said Curtailment Act entire and inseparable and as such a price-fixing statute delegating authority to the Corporation Commission to fix prices of crude oil after making the investigation required by Section 2 of the Act, and that when, as of necessity the Act be thus construed, must likewise necessarily be held to be in violation of the Fourteenth Amendment to the National Constitution, in that it deprives

(*a*) the plaintiff of its liberty of contract;
(*b*) equal protection of the law, and
(*c*) its property without due process of law.

(6) In failing to hold and decree that, if said Curtailment Act be separable and the second section thereof unconstitutional or separable therefrom, the whole Act, without Section 2, remains void for uncertainty in that it violates the Fourteenth Amendment to the National Constitution in that it is too vague, indefinite and uncertain to vest authority in the Corporation Commission to make and enforce any of the rules, regulations and orders plaintiff complains of in this case beyond the suppression of actual physical waste of crude oil.

(7) In failing to hold and decree that if said Curtailment Act be separable and the second section thereof separable therefrom, the Act is nevertheless

unconstitutional and violative of the Fourteenth Amendment and of Section 8 of Article 1 of the Federal Constitution, in this, to-wit: That it forbids the production of crude oil in excess of reasonable market demands and gives the Corporation Commission of the State of Oklahoma the authority to determine what shall be reasonable market demand, and that the enforcement of such provision must necessarily result in the fixing of the price of crude oil and must of necessity result in the burdening and regulation of interstate commerce in crude oil, and its products.

(8) In refusing to hold and decree that the following orders of the Corporation Commission in Cause No. 10,146 were intended to and actually did and do have the effect of controlling prices of crude oil in the Oklahoma City field and other fields in Oklahoma and are void because they are in excess of the powers conferred upon the Commission by the Curtailment Act, insofar as they undertake to suppress and restrain the production of crude oil in the Oklahoma City field and other Oklahoma fields without actual physical waste of said minerals, said orders being as follows:

(*a*) Order No. 5189 entered June 30, 1930,
(*b*) Order No. 5292 entered August 30, 1930,
(*c*) Order No. 5337 entered September 30, 1930,
(*d*) Order No. 5343 entered October 6, 1930,
(*e*) Order No. 5345 entered October 10, 1930,
(*f*) Order No. 5369 entered October 28, 1930,
(*g*) Order No. 5374 entered November 3, 1930,
(*h*) Order No. 5387 entered November 8, 1930,
(*i*) Order No. 5396 entered December 4, 1930,
(*j*) Order No. 5413 entered December 30, 1930,
(*k*) Order No. 5414 entered December 30, 1930,
(*l*) Order No. 5468 entered April 20, 1931,
(*m*) Order No. 5486 entered May 29, 1931,
(*n*) Order No. 5548 entered June 27, 1931,
(*o*) Order No. 5549 entered June 29, 1931;

together with the respective Journal Entries made by the Commission for the enforcement of these orders, and Plaintiff re-states that these orders separately and collectively have the force and effect of depriving plaintiff of its

(*a*) liberty of contract,
(*b*) equal protection of the laws, and
(*c*) property without due process of law,

in violation of the Fourteenth Amendment to the National Constitution.

(9) In failing to hold and decree that the orders identified in Assignment of Error No. 8, are unconstitutional and violative of the Fourteenth Amendment and of Section 8 of Article 1 of the Federal Constitution, in this, to-wit: That they forbid the production of crude oil in excess of reasonable market demands as determined by the Corporation Commission, and that such provisions must necessarily result in the fixing of the price of crude oil and must of necessity result in the regulation of interstate commerce in crude oil, and its products.

(10) In refusing to hold and decree that the orders of the Corporation Commission identified in Assignment of Error No. 8, were not promulgated for the purpose of preventing waste or protecting any other public interest, but were, on the contrary, promulgated and sought to be enforced for the purpose of controlling the crude oil market for the benefit of a particular class, to-wit, producers of crude oil.

(11) In refusing to hold and decree that the orders of the Corporation Commission, identified in Assignment of Error No. 8, were promulgated for the purpose of and did fix market demand for crude oil, within the State of Oklahoma, and were designed to

and did limit the production of crude oil within the State of Oklahoma, to such figure as would equal the market demand thus arbitrarily fixed by the Corporation Commission.

(12) In holding and decreeing that to thus limit the production of crude oil to such arbitrarily fixed market demand, constitutes a reasonable and necessary means of preventing physical waste of crude oil.

(13) * * *.

(14) In failing to hold and decree that the action of the Corporation Commission in computing market demand entirely upon the "nominations" of the pipe line companies, sustains a holding that the purpose of the orders described in Assignment of Error No. 8, was not to prevent waste or protect any other public interest, but rather to control the market for crude oil for the oil producers within the State of Oklahoma; and further sustains a holding that the orders so described do not employ reasonable or necessary means to prevent physical waste.

(15) * * *.

(16) * * *.

(17) In failing to hold and decree that the appointment of umpires by the orders described in Assignment of Error No. 8, whose salaries are paid by private operators, sustains a finding that the said orders are, and were, not promulgated for the purpose of protecting any public interest, but for the purpose of benefiting the operator paying the salaries of such umpires.

(18) In refusing to hold and decree that the market demand which is fixed by the orders of the Corporation Commission identified in Assignment of Error No. 8, is to the extent of at least 65% thereof, an interstate market demand.

(19) In failing to find that the said Curtailment Act has never been enforced by orders of the Corporation Commission, either as a waste measure or otherwise, except in periods when overproduction of crude oil has threatened a reduction of the posted or market price thereof.

(20) In refusing to hold and decree that the failure of the Corporation Commission to enforce said Curtailment Act except in periods of overproduction sustains a necessary finding that the purpose of the said curtailment act and of the orders of the Commission identified in Assignment of Error No. 8, was to control the market for a particular class, to-wit: the oil producer, rather than for the purpose of preventing physical waste of natural resources.

(21) In refusing to hold and decree that without the provisions of Section 5 of the Curtailment Act requiring the Commission to gauge or cause to be gauged each oil well for the purpose of determining its production, the provisions of Section 4 of the Act would be unconstitutional in that it vests in the Commission unlimited and unrestrained arbitrary power and discretion over Plaintiff's property and the property of others similarly situated in violation of the due process clause of the Fourteenth Amendment to the National Constitution and deprives Plaintiff and others similarly situated of their liberty of contract and equal protection of the laws guaranteed by the Fourteenth Amendment to the National Constitution.

(22) In refusing to hold and decree that a gauge of each well required by Section 5 of the Curtailment Act was a condition precedent to the Commission's authority to make any rules or orders regulating or specifying the amount of oil such well shall or may be permitted to produce.

(23) In failing to hold and decree that a legal or valid gauge of the wells in either the Seminole or Oklahoma City fields or other fields, had not been made by the Commission or under the Commission's orders and directions and that without such a gauge, the Commission was powerless to exercise the authority attempted to be conferred upon it by Sections 3 and 4 of the Curtailment Act.

(24) In refusing to hold and decree that gauges made in accordance with the rules of the Commission permitting the operator to gauge his own wells, in the presence of a representative of an adjoining operator, although agreed to by the majority of the Operator's Committee or Umpire, are void in that interested parties were permitted to determine the basis (potential production) for the proration of markets in which such operators are and were interested.

(25) In refusing to hold and decree that the Oklahoma Legislature was without power to delegate authority to the Corporation Commission to create the office of Umpire and prescribe the qualifications and duties thereof and to "arrange" for the payment by beneficiary interests, of his salary, and that if Section 5 of the Curtailment Act undertakes to vest that authority in the Commission, it is void under Section 1 of Article 4 of the Oklahoma Constitution and Section 1 of Article 5 of the Oklahoma Constitution.

(26) In refusing to hold and decree that the Commission was without authority to delegate to Ray Collins and/or Otto Bradford as Umpire or Umpires any jurisdiction of a discretionary nature and that all the rules and regulations undertaking to vest any powers in Collins and Bradford other than purely clerical or ministerial, are void.

(27) In refusing to hold and decree that gauges

made under the supervision of Collins and Bradford are illegal and void because their appointment as Umpires was against public policy and contrary to every sense of public decency and that the proration orders and regulations are all permeated with this inseparable vice and that neither Plaintiff nor others similarly situated should be coerced under threatened penalties to obey any orders and regulations so created.

(28) In refusing to hold and decree that the payment of salaries by the Operator's Committee collected by the Committee from persons, firms and corporations engaged in the production of crude oil in Oklahoma, and owning pipe lines and refineries within such State, to Ray Collins, vitiates all their alleged acts and so far contaminates the Commission's rules and regulations as to render them unenforceable and null and void as laws regulating and restraining the production of crude oil in Oklahoma.

(29) In refusing to hold and decree that under Section 1 of Article 15 of the Oklahoma Constitution and Section 126 of the Oklahoma Compiled Statutes of 1921, the failure of Ray Collins and Otto Bradford to take and subscribe to the oath of office of Umpire or Umpires was a misdemeanor and operated to forfeit the right of each to the office of Umpire.

(30) In refusing to hold and decree that insofar as Section 8 of the Curtailment Act undertakes to authorize the Commission to impose fines under Section 3498 of Oklahoma Compiled Statutes of 1921 for the violation of any of its rules and orders complained of in this case, the same is in violation of Section 1 of Article 4 of the Oklahoma Constitution, Sections 19 and 35 of Article 9 of the Oklahoma Constitution.

(31) In refusing to hold and decree that the orders, rules and regulations of the Commission and their en-

forcement operate directly to interfere with, restrain, and burden interstate commerce in violation of Section 8 of Article 1 of the National Constitution.

(32) In making and entering, over the objection of Plaintiff, its Final Decree of September 11th, 1931.

For further specification of Assigned Errors to be urged, the Appellant will also rely upon its Assignment of Errors Nos. 3, 9, 13, 15, 16, and 33 to 109, inclusive, as set forth in the Record, Vol. I, Part 2, pp. 379 to 391, inc.; and states that,

(*a*) No. 3 relates to the constitutionality of the so-called Curtailment Act;

(*b*) Nos. 9, 13, 15, 16, and 36, relate to the constitutionality of the Administrative Orders of the Commission;

(*c*) Nos. 9 and 52, relate to monopolistic control of the oil business;

(*d*) Nos. 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, and 81, relate to the Requested Findings of Fact by Appellant;

(*e*) Nos. 82, 83, 84, 85, 86, 87, 88, 89, and 90, relate to the Findings of Fact by the Trial Court;

(*f*) Nos. 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107 and 108, relate to the conclusions of law by the Trial Court; and

(*g*) No. 109 to the Overruling and Denying Petition for Rehearing.

## APPENDIX C.

### History of Case Through the Court Below.

*First.* On December 10th, 1930, plaintiff served notice on the then Governor of Oklahoma and the Attorney-General that on December 17th, 1930, it would present to a three-judge court, at Oklahoma City, Oklahoma, its application for a temporary injunction (R., vol. 1, pt. 1, p. 2).

*Second.* On February 9th, 1931, the three-judge court rendered and entered an order denying the application for a temporary injunction (R., vol. 1, pt. 1, p. 3).

*Third.* On April 22nd, 1931, plaintiff prayed an appeal to the Supreme Court of the United States from the order denying a temporary injunction, which appeal was allowed (R., vol. 1, pt. 1, p. 4) and perfected as shown by the record on file in this court entitled *Champlin Refining Company,* appellant, vs. *Corporation Commission of the State of Oklahoma, etc., et al.,* appellees, No. 122, October Term, 1931, of which record this court will take *judicial notice. National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 74 L. Ed. 881.

*Fourth.* On January 10th, 1931, the term of office of Fred Capshaw, defendant, having expired, his successor in office, Paul Walker, was substituted as one of the defendants, as shown by the findings of fact (R., vol. 1, pt. 2, p. 177).

This revivor against Walker as Capshaw's successor was authorized by Ch. 88, Okla. Session Laws of 1923, and the Act of Congress approved February 13, 1925 (St. L., vol. 43, p. 941).

*Fifth.* As alleged in plaintiff's third amended and supplemental bill it filed its second amended and supplemental bill on May 29th, 1931 (R., vol. 1, pt. 1, p. 6).

*Sixth.* On June 8th, 1931, plaintiff served notice on Honorable William H. Murray, the present governor,

that on June 13th, 1931, it would present its application to the three-judge court for a temporary injunction (R., vol. 1, pt. 1, p. 5).

*Seventh.* On June 13th, 1931 (R., vol. 1, pt. 2, p. 373), the three-judge court below entered an order ordering and adjudging "until the further order of this court, that the defendants, Paul Walker, E. R. Hughes and C. C. Childers, individually and as members of the Corporation Commission of the State of Oklahoma, and all persons acting by or under them, be and they are hereby enjoined from instituting any proceedings against the plaintiff under the provisions of Sections 3498, 3499 and 7959, Okla. C. St. 1921, on account of alleged violations of said proration order or orders; that the defendants, Louis R. Morris, individually and as county attorney of Oklahoma County, Oklahoma, and J. Berry King, individually and as Attorney General of the State of Oklahoma, and all persons acting by, through or under them, be and they are hereby enjoined from instituting or prosecuting receivership proceedings against the plaintiff under the provisions of Section 7962, Okla. C. St. 1921, "and by said order permitted the plaintiff, until further order of the Court, to produce from its wells in the Oklahoma City field a maximum of 10,000 barrels per day.

*Eighth.* On August 3rd, 1931, plaintiff filed its third amended and supplemental bill (R., vol. 1, pt. 1. p. 6. For matters on which the order of June 13th, 1931, above referred to, was based, see R., vol. 1, pt. 1, pages 30 to 34 inclusive.

*Ninth.* On August 5th, 1931, this case was heard on its merits before the three-judge court, the defendant Commissioners appearing by their counsel, the Governor appearing by his special counsel, Charles J. West, and the Attorney General appearing for himself and other defendants (R., vol. 1, pt. 2, p. 248). On that same date the court made and filed its order vacat-

ing its order of June 13th, 1931, allowing plaintiff to produce a maximum of 10,000 barrels per day from its Oklahoma City wells and staying the enforcement of the Commission's proration orders and regulations pending decision by this court on appeal (R., vol. 1, pt. 2, p. 375).

*Tenth.* A final decree was filed September 11th, 1931, adjudging the Curtailment Act constitutional and the orders, rules and regulations of the Commission valid, to which plaintiff excepted, and also adjudging Sections 8 and 9 of the Curtailment Act, being the penalty provisions, invalid, to which the defendants and each of them excepted. The Court entered an order perpetually enjoining the defendants, J. Berry King, Attorney General, and Louis R. Morris, County Attorney of Oklahoma County, and each of them, their servants and employees, from enforcing or attempting to enforce the provisions, or any part thereof, of Sections 8 and 9 of the Act, to which the defendants and each of them excepted; and therein denied plaintiff all other relief, to which plaintiff excepted (R., vol. 1, pt. 2, p. 248, etc.).

*Eleventh.* On September 11th, 1931, the Court filed its (*a*) special findings of fact (R., vol. 1, pt. 2, p. 177) and (*b*) conclusions of law (R., vol. 1, pt. 2, p. 213).

*Twelfth.* On September 16th, 1931, the plaintiff's petition for rehearing was denied (R., vol. 1, pt. 2, p. 250).

*Thirteenth.* The petition for appeal from the final judgment to the Supreme Court of the United States was filed September 23, 1931, with assignment of errors (R., vol. 1, pt. 2, p. 379).

*Fourteenth.* Plaintiff's appeal was allowed October 15th, 1931, and appeal bond executed (R., vol. 1, pt. 2, p. 392).

*Fifteenth.* On October 15th, 1931, the Court below extended the time for filing record in the Supreme Court of the United States until November 25th, 1931 (R., vol. 1, pt. 2, p. 405).

## APPENDIX D.

### Legal Points Preliminary to Main Questions.

FIRST.

**Although Section 7 of the Curtailment Act gives the Oklahoma Supreme Court jurisdiction "to review the action of said Commission in making any order, or orders, under this Act", plaintiff had the right to invoke the jurisdiction of the Federal District Court without appealing to the State Supreme Court for two reasons:**

(*a*) In so far as the Act undertakes to confer jurisdiction in the Oklahoma Supreme Court to exercise any administrative, legislative or non-judicial function or supervision over the Commission's legislative or administrative orders, it is void under Section 2 of Article 7 of the Oklahoma Constitution vesting the Supreme Court with appellate jurisdiction coextensive with the state in "all civil cases at law and in equity," and Section 1 of Article 4 of the Oklahoma Constitution dividing the powers of government of the state "into three separate departments: the Legislative, Executive and Judicial" and declaring that "except as provided in this constitution, the Legislative, Executive and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others." (See Compiled Oklahoma Statutes 1921, pages 127 and 159.)

In *In re County Commissioners of Counties Comprising Seventh Judicial District*, 22 Okla. 435, 98 Pac.

557, the court held that an act of the legislature providing that upon the recommendation of the Supreme Court "the Governor shall appoint an additional judge" for a designated time was void and unconstitutional in that it undertook to delegate to the Supreme Court legislative powers. See, also:

*Bacon* v. *Rutland R. Co.*, 232 U. S. 134, 58 L. Ed. 538;

*In re Burnette*, 73 Kan. 609, 85 Pac., 575;

*Helena Water Co.* v. *City of Helena*, 277 Fed. 66;

*Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 74 L. Ed. 969;

*Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 74 L. Ed. 972.

(*b*) Because the Supreme Court on appeal, if it accepted appellate jurisdiction, would be confined to judicial questions in reviewing the Commission's orders—that is, questions as to whether the Commission had exceeded its powers conferred by the Curtailment Act, or whether the Act is in violation of the state or National Constitution, or whether the Commission's *orders* violate any provision of the state or National Constitution—all judicial questions.

The Commission's rules were made to govern the *future conduct* of parties by prescribing in advance how much oil they would be permitted to produce during future periods, generally three months.

As said by Mr. Justice Holmes in *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210-226, 53 L. Ed. 150-158:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or

past facts and under laws supposed already to exist," whereas "Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

Substantially the same distinction between judicial and legislative powers was made in *In re County Commissioners of Counties Comprising Seventh Judicial District,* 22 Okla. 435, 98 Pac. 557.

The State Supreme Court on appeal has no power to substitute its own legislative or administrative orders for those of the Commission as it may do in railroad and transportation rate cases, under Section 23 of Article 9 of the Oklahoma Constitution, empowering the court on appeal from orders of the Commission "affecting the rates, charges or the classifications of traffic of any transportation or transmission company" to "substitute therefor such orders as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise the reversal order shall not be valid."

The sections of Article 9 of the Oklahoma Constitution creating the Commission and conferring upon it legislative and administrative powers with the right of appeal to the Supreme Court were taken from the Virginia Constitution creating the Virginia Corporation Commission and under review in *Prentis* v. *Atlantic Coast Line Company,* 211 U. S. 210, 53 L. Ed. 150.

The State Supreme Court on appeal from an order of the Corporation Commission fixing railroad rates may exercise legislative and administrative powers be-

cause the Oklahoma *Constitution*, not any statute, confers upon it such powers in railroad rate cases. When the State Supreme Court will exercise appellate jurisdiction from the Corporation Commission and when not was considered in

*Atchison, T. & S. F. Ry. Co.* v. *State*, 28 Okla. 797;

*St. L. & S. F. R. Co.* v. *State*, 28 Okla. 802;

*Shawnee Gas & Electric Co.* v. *State*, 31 Okla. 505;

*Harriss-Irby Cotton Co.* v. *State*, 31 Okla. 603.

In *Bacon* v. *Rutland Railroad Co.*, 232 U. S. 134, 58 L. Ed. 538, the railroad company had filed a bill to restrain the public service commission of Vermont from enforcing an order concerning a passenger station. The Commission moved to dismiss on the ground that the appellee had *not* taken an appeal from the order to the Vermont Supreme Court as provided by the statutes, and therefore ought not to be heard to complain elsewhere. This court pointed out that under the Vermont Constitution the powers of government were divided into three branches, legislative, judicial and executive, and that unlike the Virginia Constitution under consideration in *Prentis* v. *Atlantic Coast Line Company*, the Vermont Constitution did not confer any legislative powers upon the Vermont Supreme Court and consequently on appeal from the public service commission's ruling to the Vermont Supreme Court that court would be confined to the exercise of judicial powers. Mr. Justice Holmes said:

> "This being so, by the rule laid down in *Prentis* v. *Atlantic Coast Line Co.*, the railroad

company was free to assert its rights in the District Court of the United States."

In other words, whenever a case reaches the judicial stage the complaining party has the choice of forum—he may appeal to the state Supreme Court, if appeal is allowed, or he may invoke the jurisdiction of the Federal court.

*Prendergast* v. *New York Tel. Co.*, 262 U. S. 43-51, 67 L. Ed. 853; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 200, 68 L. Ed. 979; *Nelson* v. *First National Bank*, 42 Fed. (2d) 30, by the Eighth Circuit Court of Appeals, and *Pacific Tel. & Tel. Co.* v. *Cushman*, 292 Fed. 930, are exactly in point. In the latter case the Court of Appeals issued a mandamus to compel the District Court to take jurisdiction of a bill in equity filed by a public service corporation to restrain alleged confiscatory rates fixed by the State Commission *although the statutes of the state granted an appeal from the orders of the Commission to the state Supreme Court.*

The 35th section of the amended bill (R., vol. 1, pt. 1, p. 33), alleges that on November 7th, 1930, plaintiff filed with the Commission its special appearance and motion to vacate its rules and regulations, stating that it had commenced this action on September 15th, 1930, for the purpose of enjoining the enforcement of the rules and the Curtailment Act, by which motion it prayed the Commission to set aside its rules in so far as plaintiff is concerned and if this relief is denied that the Commission suspend the enforcement of the penalty provisions of the statute during the pendency

of this action, all of which motion was denied by the Commission on November 20th, 1930.

The 35th section of defendant's answer (R., vol. 1, pt. 1, p. 72), admits these allegations, averring, however, that plaintiff did not appeal from the order of the Commission to the Supreme Court. If plaintiff was required to appeal from every order the Commission made to the Supreme Court there never could be any end to the controversy. Such a proceeding before the Commission would have been entirely futile and the plaintiff was not required to file such a series of motions and go through such vain proceedings.

*Love* v. *A. T. & S. F. Ry. Co.*, 185 Fed. 321 (8th Cir. Apps.).

SECOND.

**Prohibitions of the Fourteenth Amendment are addressed to individuals acting as agents of the state and officers and agents of the state may be enjoined by the Federal courts from using the power of their office to deny any person the rights guaranteed by the Fourteenth Amendment.**

*Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U. S. 278, 57 L. Ed. 510;

*Ex parte Commonwealth of Virginia*, 100 U. S. 339, 25 L. Ed. 677;

*Georgia Power Co.* v. *Decatur*, 281 U. S. 505, 74 L. Ed. 999;

*L. & N. R. R. Co.* v. *Garrett*, 231 U. S. 313, 58 L. Ed. 242;

*Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 64 L. Ed. 596.

THIRD.

**The rules, regulations and proration orders of the Commission being legislative in nature, are laws within the meaning of the Constitution of the United States and the laws of Congress regulating Federal court jurisdiction.**

*Lake Erie & Western Railroad Co.* v. *State Public Utilities Commission, etc.*, 249 U. S. 422, 63 L. Ed. 687;
*Virginia* v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;
*Philadelphia Co.* v. *Stimson*, 223 U. S. 605-638, 56 L. Ed. 570;
*Yick Wo.* v. *Hopkins*, 118 U. S. 356, 30 L. Ed. 220;
*Home Teleph. & Teleg. Co.* v. *Los Angeles*, 227 U. S. 278, 296, 57 L. Ed. 510.

FOURTH.

**If this Court holds the Curtailment Act is constitutional, nevertheless plaintiff is entitled to an injunction against the enforcement of the Commission's orders and rules if they are (a) in excess of the Commission's powers conferred by the Curtailment Act, or (b) otherwise in conflict with the National Constitution.**

*Herkness* v. *Irion*, 278 U. S. 92-96, 73 L. Ed. 198.

In the *Herkness case, supra*, this Court said, "We have no occasion to consider any of the constitutional questions presented." The court upheld the jurisdiction on the ground that the bill "challenged the

validity under the Federal Constitution of an order of an Administrative Board of the State," and having found that the Administrative Board had exceeded its powers it reversed the judgment of the three-judge court refusing an injunction.

FIFTH.

**Plaintiff having filed this suit on September 15th, 1930, challenging the constitutionality of the Curtailment Act and praying for an injunction restraining the Commission from enforcing the same, is entitled to the independent judgment of this Court in the construction of the Curtailment Act, although the Oklahoma Supreme Court (two justices dissenting), in an opinion filed on October 14th, 1930, in Julian Oil and Royalties Co. v. Capshaw, 145 Okla. 237, 292 Pac. 841, construed the statute and on its construction upheld its constitutionality.**

On August 28th, 1930, the C. C. Julian Oil and Royalties Company filed a petition in the Oklahoma Supreme Court against the Corporation Commission praying for a writ of prohibition restraining the Commission from enforcing the Curtailment Act. (See R., vol. 2, pt. 3, p. 269.)

We submit:

(*a*) Plaintiff's right to drill having vested and actual drilling of its wells on its oil leases and lands and extract therefrom oil and gas having commenced before the institution of the Julian Oil and Royalties Company case in the Supreme Court, this court will exercise its independent judgment in the construction of the

Curtailment Act and will determine for itself not only the construction of such Act but its validity under the constitution of the State of Oklahoma and the Constitution of the United States.

*Burgess* v. *Seligman*, 107 U. S. 20, 27 L. Ed. 359;
*Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 532, 48 L. Ed. 778;
*Jones* v. *Great Southern Fireproof Hotel Co.*, 86 Fed. 370 (6th Cir. Apps. by Judge Lurton);
*Folsom* v. *Township*, 159 U. S. 611, 40 L. Ed. 278;
*City and County of Denver* v. *Denver Tramway Corp.*, 23 Fed. (2d) 287 (8th Cir. Apps.);
*Fetzer* v. *Johnson*, 15 Fed. (2d) 145 (8th Cir. Apps.);
*State of Missouri* v. *Angle*, 236 Fed. 644 (8th Cir. Apps.);
*Mothersead* v. *United States F. & G. Co.*, 22 Fed. (2d) 644 (8th Cir. Apps.);
*Carroll County* v. *Smith*, 111 U. S. 556, 28 L. Ed. 517;
*East Alabama Ry. Co.* v. *Doe*, 114 U. S. 340, 29 L. Ed. 136;
*Oklahoma City* v. *Dolese*, 48 Fed. (2d) 734 (10th Cir. Apps.);
*Connally* v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322;
*Black on the Law of Judicial Precedents*, p. 484.

(*b*) In so far as the validity and constitutionality of the Commission's rules and regulations here involved are concerned the opinion in the Julian case is not binding on this court because the petition for writ of prohibition involved only the question as to whether

the Commission had *jurisdiction* to make any sort of rules and regulations, rather than the question of the constitutionality of such rules and regulations after having been made. The Julian opinion did not pass upon the constitutionality of the rules and whether those rules are confiscatory or not is an open question for the Federal Courts to decide. The Julian decision merely upholds the constitutionality of the Act and that it conferred jurisdiction upon the Commission. This is emphasized in the concurring opinion of Justice Hunt (145 Okla. 246), 292 Pac. 841, wherein he said that "under numerous decisions of this court the writ will not issue unless it clearly appears that the Commission is wholly without jurisdiction or authority to do what it is attempting to do or is attempting to make an unauthorized application of judicial force," citing Oklahoma authorities.

In *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, 64 L. Ed. 596, this court held the order of the Commission there involved was a legislative order and that under the 14th Amendment plaintiff was entitled to an opportunity for a judicial review of its contention that the rates were not compensatory. The Commission contended that under the Oklahoma Constitution the validity of its orders could be reviewed by the state Supreme Court on application for writ of prohibition, to which this court replied:

> "The challenge of a prescribed rate as being confiscatory raises a question not as to the scope of the Commission's authority, but of the correctness of the exercise of its judgment,"

citing *Hirsh* v. *Twyford,* 40 Okla. 220.

SIXTH.

**This Court is not bound by the decision of the State Supreme Court in the Julian case that the Curtailment Act is not in violation of the National Constitution.**

*Connally* v. *General Construction Co.*, 269 U. S. 385;

*Crescent City Live Stock Landing and Slaughter-House Co.* v. *Butchers' Union Slaughter-House and Live Stock Landing Co.*, 120 U. S. 141-160;

*Piqua Branch of the State Bank of Ohio* v. *Knoop*, 16 How. 370, 391;

*Encyc. of U. S. Supreme Court Reports*, vol. 4, p. 1066.

SEVENTH.

**A corporation is a person within the due process and equal protection clauses of the 14th Amendment to the National Constitution.**

*Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105, 73 L. Ed. 204;

*Frost* v. *Corporation Commission*, 278 U. S. 515, 73 L. Ed. 483;

*Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666.

EIGHTH.

**Equity will restrain the enforcement of a criminal statute where necessary to protect property rights.**

*Terrace* v. *Thompson*, 263 U. S. 216;

*Williams* v. *Standard Oil Co.*, 278 U. S. 235;

*Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207, 47 L. Ed. 778;
*Wadley S. R. Co.* v. *Georgia,* 235 U. S. 651, 59 L. Ed. 411;
*Truax* v. *Raich,* 239 U. S. 33, 60 L. Ed. 131, L. R. A. 1916-D, 545;
*Dobbins* v. *City of Los Angeles,* 195 U. S. 223, 49 L. Ed. 169;
*Daly* v. *Elton,* 195 U. S. 242, 49 L. Ed. 177;
*Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 56 L. Ed. 570;
*Campbell* v. *Motion Picture Machine, etc.,* 151 Minn. 220, 27 A. L. R. 631.

The penalty of 30 days imprisonment or $5,000.00 fine or both, imposed by Section 8 of the Act, is for *"violating the provisions of this Act"* and not for violating the rules and regulations of the Commission. Also the penalty of a receivership imposed by Section 9 of the Act is for *"violating the provisions of this Act"* and not for violating the rules and regulations of the Commission.

In *United States* v. *Eaton,* 144 U. S. 677, 36 L. Ed. 591, the court had under consideration an Act of August 2nd, 1886, imposing special taxes on manufacturers of oleomargarine, etc. The defendant was indicted for violating the regulations of the Commissioner of Internal Revenue made with the approval of the Secretary of the Treasury. The court said that "It is well settled that there are no common law offenses against the United States" and therefore held the indictment would not lie.

Under Section 1500, Okla. Comp. St. 1921, "No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code", which means all common law offenses are abolished in Oklahoma.

To the same effect see *Stewart* v. *State*, 4 Okla. Cr. 564, 109 Pac. 243.

*United States* v. *Grimaud*, 220 U. S. 506, is not in point because the statute made it a criminal offense to violate a rule and regulation of the Secretary.

NINTH.

**The jurisdiction of the District Court in a suit arising under the National Constitution and that of the Supreme Court on appeal, extends to the determination of all questions in the case, including questions of state law, and this Court may decide the Federal questions adverse to the party raising them or omit to pass on them, but decide the case on local or state questions only.**

*Greene* v. *L. & I. R. Co.*, 244 U. S. 499;
*Hopkins* v. *Southern California Teleph. Co.*, 275 U. S. 393;
*Davis* v. *Wallace*, 257 U. S. 478;
*Siler* v. *L. & N. R. R. Co.*, 213 U. S. 191;
*Ohio Tax Cases*, 232 U. S. 576.

## APPENDIX E.

### Quotations from Opinions Cited on Pages 38 and 39 of This Brief.

In *Barnard* v. *Monongahela Natural Gas Co.*, 216 Pa. 362, 65 Atl. 801, the Pennsylvania Supreme Court adopted the opinion of the Court below answering in the affirmative this question: "Can a landowner in gas territory drill a well on his farm close to the line of his adjoining landowner and draw from the land of the latter three-fourths of the gas that his well may produce without so invading the property rights of the adjoining landowner as to be legally accountable therefor?" The Court said:

> "'The right of every landowner to drill a well on his own land at whatever spot he may see fit' certainly must be conceded. If, then, the landowner drills on his own land at such a spot as best subserves his purposes, what is the standing of the adjoining landowner whose oil or gas may be drained by this well? *He certainly ought not to be allowed to stop his neighbor from developing his own farm.* There is *no certain way of ascertaining* how much of the oil and gas that comes out of the well was when in situ under this farm and how much under that. What then has been held to be the law? It is this, as we understand it, *every landowner or his lessee* may locate his wells *wherever he pleases, regardless of the interests of others.* He may distribute them over the whole farm or locate them only on one part of it. He may crowd the adjoining farms so as to enable him to draw the oil and gas from them. What then can the neighbor do? *Nothing; only go and do likewise.* He must protect his own oil and

gas. He knows it is wild and will run away if it finds an opening and it is his business to keep it at home. This may not be the best rule; but neither the Legislature nor our highest court has given us any better. No doubt many thousands of dollars have been expended 'in protecting lines' in oil and gas territory that would not have been expended if some rule had existed by which it could have been avoided. Injunction certainly is not the remedy. If so, just how far must the landowner be from the line of his neighbor to avoid the blow of 'this strong arm of the law'?"

In *People's Gas Co.* v. *Tyner,* 131 Ind. 277, 31 Am. St. Rep. 433, the Court held that a landowner has the right to increase the flow of natural gas by shooting the well on his premises though by so doing he will draw off and diminish the supply of natural gas in the lands of another.

In *Kelley* v. *Ohio Oil Co.,* 57 Ohio St. 317, 63 Am. St. Rep. 721, the Court held that an owner or lessee of oil lands has an absolute right to drill an oil well near the division line of his land, so long as all operations are confined to the lands upon which the well is drilled, and whatever gets into such well, either by percolation or by flowing through unknown natural underground channels, belongs to the owner of the well, no matter where it comes from. The Court said:

"The right to drill and produce oil on one's own land is absolute and cannot be supervised or controlled by a court, or an adjoining landowner. So long as the operations are legal, their reasonableness cannot be drawn in question," and pointed out in *Letts* v. *Kessler,* 54 Ohio St. 73, that "it is intolerable that the owner of real property, before making improvements on his own lands, should be compelled to submit to what

his neighbor, of a court of equity, might regard as a reasonable use of his property."

In *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 145 La. 233, 82 So. 206, 5 A. L. R. 411, the Court held that the owner of land under which there is fugitive mineral oil can not complain that his neighbor uses a pump in a well located on his property, although the effect is to drain oil from beneath land of another. The Court also held that the owner can not be deprived *even by statute of the legitimate use of his property because* it may cause a real damage to his neighbor. That is an exhaustive opinion discussing the meaning of "infringement of right." It refers to and quotes the Civil Law Writers and Code Napoleon and points out the difference between the use of property for a beneficial purpose and its use with no benefit to the owner but injury to the neighbor. It points out the right of an owner to construct a building which cuts off his neighbor's light or drill a hole on his land into percolating waters that diverts water from his neighbor's land to his own land. One cannot exercise his common right "for the sole purpose of causing injury" to his neighbor. "If the owner who uses his right does it through malice, from a desire to injure, without any profit to himself, will he be held bound to repair the damage he causes, although he does not infringe any right?" was answered by the Roman Law by saying, "Would it not be to encourage this perversity, if a right were allowed to be used for the sole purpose of injuring another." The Louisiana Supreme Court quoted the following from the Roman authorities:

> "And that has been the view taken by the courts. An owner constructs a building which cuts off his neighbor's light. In so doing he but exercises a right he has, and therefore owes no reparation of the damage he causes to the neigh-

bor. But he does more; he erects in front and almost against the window of his neighbor, part of which is already masked by the new building, a dummy chimney, beginning on the roof, resting on the rafters, at the extreme corner of the gable end of the building, and which cuts off all the light from the window. The Court of Colmar ordered the suppression of the dummy chimney. It acknowledges that the owner can, in strictness (sic), abuse of his property, but on one condition, that he does not do it for the purpose of injury. Rights are serious things and must be used seriously. Beyond that serious use there is no right, but only wickedness, and justice cannot sanction an act prompted by malevolence.

"An owner constructing works on his land *diminishes the volume of a spring,* the benefit of which his neighbor has been having. *He is within his right.* If he thereby causes an injury to his neighbor, the latter cannot complain; for he has *not the absolute ownership of the waters.* But, if it has been by malice that the works have been undertaken, for the sole purpose of injuring the neighbor, we have no longer the exercise of a right, but spitefulness, and he who abuses malignantly of his right ought to repair the damage he causes. This was the decision of the Court of Lyons in the following case: A mineral spring spreads over several tracts. One of the owners sets up a pump for getting a larger quantity of the water, *not for using it, but for pouring it, in pure waste,* and we will add, through spite, into a river. The Court condemned him in damages, but without ordering the suppression of the pump. We think that in the latter connection the Court was too conservative. From the moment that an act can be characterized as illicit the

> owner can no longer invoke any right of ownership; now an unlawful act should disappear."

In the Louisiana case the plaintiff held an oil lease adjoining another tract on which defendant held a similar lease. The plaintiff sunk a well on its tract "and was drawing oil from it by means of a pump at the rate of some 124 barrels a day; when the defendant sunk a well on its tract approximately 400 feet from plaintiff's well. This well of defendant proved a nonproducer, and was abandoned. Through some underground communication it lets air into the radius affected by plaintiff's pump, thereby reducing the suction power of the pump, and as a consequence reducing markedly its production. By closing this dry well, which may be done with no trouble or expense by simply putting back the plug that has been taken out, the capacity of plaintiff's pump is at once restored. Defendant refuses to close it; and plaintiff brings this suit to compel defendant to do so, and also to recover the damages suffered up to now, and continuously being suffered, as the result of the reduced production of the pump." The Louisiana Supreme Court reversed the judgment in favor of defendant and held that defendant was not the owner of the oil and gas under his land and had no right to interpose any obstacle to diminish the capacity of plaintiff's pump to suck oil from underneath defendant's land, and said:

> "From these excerpts it is clear that cases like the present are not to be decided by the application of any broad or inflexible rule, but by a careful weighing of all the circumstances attending them, by diagnosing them, to use the expression of Baudry-Lacantinerie and Chauveau, with the aid and guidance of the two principles, that the owner must not injure seriously any right of his neighbor, and, even in the absence of any right

on the part of the neighbor, must not in any unneighborly spirit, do that which, while of no benefit to himself, causes damage to the neighbor.

"Defendant does not contest the right of plaintiff to get out of its land all the oil it possibly can, and by means of a well, but contests plaintiff's right to do this by means of a pump, because a pump sucks the oil from under defendant's land. The argument is that plaintiff may appropriate the oil passing from defendant's land to plaintiff's, provided the oil passes, or flows, from the one tract to the other 'naturally,' that is, by gravity, and not as the effect of the use of artificial means.

"So far as artificiality is concerned, we do not see the difference between a well and a pump; both are artificial; both cause the oil to flow from the neighbor's land; and both produce that effect by creating a vacuum which the oil from the neighbor's land comes in to fill. In both cases the oil flows from the neighbor's land by gravity. The fact that some of the oil which plaintiff's pump is producing may come from defendant's land can make no difference; for in the case of a flowing well so close to the boundary line that one-half of its product would to a reasonable certainty be known to be coming from the adjoining tract the owner of this tract would hardly, we imagine, claim either the ownership of one-half of the oil or the right to close the well; *and the reason would be that an owner of land does not own the fugitive oil beneath it.*

"The analogy between the subterranean oil and subterranean or percolating waters is, we believe, complete, and defendant cites the case of *Forbell* v. *New York,* 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, where the

operation of a pump was enjoined because it had the effect of drying up the surface of the land to the great damage of the neighbor. That decision would be in point if the surface of defendant's land was being injured by plaintiff's pump. True, the Court reasoned the case somewhat differently; but that was the true ground of the decision, for the Court admitted that, so far as the water was concerned, the complainant had no ownership of it; and of course, if so, the taking of it, whether by means of a pump or otherwise, invaded no right of the complainant, and therefore furnished no ground of action. But invasion of the surface did, because the complainant had the right to use and enjoy the surface uninterfered with by the pump of the defendant city. In a pumping case where no surface right of the neighbor was being interfered with, but only the percolating water was being taken, the Supreme Court of Mississippi denied an injunction, although the complainant's supply of water was being thereby reduced. *Clarke County* v. *Mississippi Lumber Co.*, 80 Miss. 535, 31 So. 905. In the civil law the right to drain off by means of a deeper well the subterranean water of the neighbor is well settled, and apparently in the common law too. 20 Am. & Eng. Enc. Law, 314. Judge Thornton, in his work on Oil & Gas, 2d ed., p. 49, says that if pumps could not be used oil territory would be practically useless, and few wells would ever be drilled. And, of course, what is meant by this is that the neighbor cannot complain, even though possibly, or probably, the oil under his land is being drained off by the pump.

"All operators in the oil field in question, including defendant, are using pumps; what good ground, then, could defendant have for denying plaintiff the right to do that same thing?

"Plaintiff's right to operate this pump would appear, therefore, to be clear, and that defendant's well, or air pipe, is seriously interfering with the operation of the pump, is one of the facts alleged in the petition which for present purposes must be taken for true.

"Were defendant leaving this well open for some purpose of utility other than the supposed utility of preventing the drainage of the oil from under defendant's land, a different case might perhaps be presented; but the allegation, which must be taken for true, is that leaving this well open is of no benefit to defendant. It will be noted that this action of defendant in leaving this well open has the effect not merely of preventing plaintiff from drawing the oil from under defendant's land, but also from under plaintiff's own land; so that an unquestioned right of plaintiff is being interfered with."

See, also:

*Louisiana Gas & Fuel Co.* v. *White Bros.*, 157 La. 728, 103 So. 23.

In *Calor Oil & Gas Co.* v. *Franzell*, 128 Ky. 715, 109 S. W. 328, the Court said:

"If it be true, as said in the briefs, that the natural gas in the district of Meade county is contained in a common reservoir underlying the whole area, of necessity it follows that the gas company's use of its wells tends to exhaust the wells of the heating company; and it is equally true that the piping of gas by the heating company from its wells tends to exhaust the gas company's wells; and undoubtedly the operation of two gas companies in the same field (assuming that the quantity of gas is limited)

will exhaust it sooner than one of them would. *But each has the legal right to the legitimate use of the gas underlying its own property,* and neither can complain of such use by the other. We have already held, in the cases of *Commonwealth* v. *Trent*, etc., 117 Ky. 34, 77 S. W. 390, and *Calor Oil & Gas Co.* v. *McGehee*, 117 Ky. 71, 77 S. W. 368, that one who illegitimately wastes or destroys the gas of a district may be punished under the criminal statutes of the state, and may also be enjoined from committing such wrongful acts; *but all parties owning gas wells in the district are free to make any legitimate use of the gas they choose, and the fact that this legitimate use tends to exhaust the supply gives the other owners of gas wells in the district no just ground of complaint.* The court knows, as a part of the history of the country, that natural gas districts after flourishing for a while are frequently entirely exhausted, and that manufacturing and power plants established in the district, and dependent upon the use of the gas for fuel, are forced to move elsewhere. This may happen to the district under consideration; *but, as said before, if this results from legitimate sales by the various owners to their customers, no one of them has a just ground of complaint. They have all enjoyed the property while it existed, and when it is exhausted they, of course, can no longer enjoy it.*"

In *Jones* v. *Forest Oil Co.*, 194 Pa. 379, 48 L. R. A. 748, the court held that a gas pump may lawfully be used to increase the production of an oil well although the production of wells on adjoining property is thereby diminished. In drawing the distinction between the exercise of a legal right for a useful pur-

pose and the exercise of a right resulting in no benefit to the owner, the court said:

> "In regard to wells and springs, the law is well settled that the owner of land is not entitled to recover for injuries to his wells and springs caused by the acts of an adjoining owner, if the injury results from a *lawful exercise* of the rights of the adjoining owner, *on his own property*, and without malice or negligence. An owner of land may dig a well upon his property and if, in so doing, he taps the hidden flow of water, which supplies his neighbor's spring, it is a loss to the neighbor for which the law provides no remedy."

The court held that the plaintiff in that case had no right to assume there is a certain, fixed amount of oil and gas under his farm in which he has an absolute property right, and said:

> "In *Ballard* v. *Tomlinson*, L. R. 29 Ch. Div. 115, it was held that a landowner has the right to all of the percolating stream under his land, the court saying: 'This percolating water below the surface of the earth is therefore a *common reservoir* or source in which nobody has any property, but of which everybody has, so far as he can, the right of *appropriating* the whole. The principle of natural user does not apply at all. The plaintiff, if he has a right to use anything in nature, has a right to exercise that user by all the skill and invention of which man is capable; and it seems to me that as long as the plaintiff uses only lawful means as against his neighbor, however ingenious or however artificial those means may be, his right to appropriate the common source is not diminished be-

cause he uses the most artificial or most ingenious methods.' If it is lawful to take water from a substrata by the 'exercise of all the skill and invention of which man is capable,' we see no reason why it is not lawful to produce oil by those means, especially as the possession of the soil for purposes of tillage gives the owner no actual possession of the oil and gas underlying."

In *Peterson* v. *Grayce Oil Co.*, 37 S. W. (2d) 367, the Texas Court of Civil Appeals handed down an opinion on January 31st, 1931, holding that a leaseholder has a right to the natural flow of the oil from sources not located under his lease but common to the holders of other leases supplied from the so-called common source. The suit was an action for damages to recover the value of oil which plaintiff alleged had been lost to it by defendant's operation of a vacuum pump. The Railroad Commission, under authority of an Act of the Legislature, had promulgated a rule prohibiting future installation of vacuum pumps or other devices for the purpose of putting a vacuum on any gas or oil bearing stratum, except in certain cases. The Legislature had conferred power upon the Railroad Commission "over all common carrier pipe lines conveying oil or gas in Texas, and over all oil and gas wells in Texas, and over all persons, associations or corporations owning or operating pipe lines in Texas * * *," and empowered the Commission "to make all necessary rules and regulations for the government and regulation of such persons, associations, and corporations and their operations * * *." While sustaining the power of the Legislature to authorize the Commission to prohibit the use of vacuum pumps the court cited and commented upon *Oxford Oil Company* v. *Atlantic Oil Producing Co.*, 22 Fed. (2d) 597, and also *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, and

*Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61, and said:

"Although oil is of a fugitive nature and may, as the result of the operation of natural subterranean agencies, pass from one location to another, yet it is well settled by the decisions of our Supreme Court that oil in place belongs to the owner of the title to the land, and that an oil lease executed by the fee simple owner conveys an interest in realty. See *Waggoner Estate* v. *Sigler Oil Co.*, 19 S. W. (2d) 27, by our Supreme Court in an opinion by Justice Greenwood, in which many of the former decisions of the same court are extensively reviewed. From that rule of decisions it follows that oil in place and belonging to the title owner or leaseholder of the land where it is located may, *like surface accretions of the soil*, be lost to that owner and become the property of the title holder or leaseholder of an adjoining tract whenever such flow occurs solely through the operation of *natural agencies in a normal manner*, as distinguished from artificial means applied to stimulate such a flow. * * *

"The right of plaintiffs to an undisturbed flow of oil, in its *natural course, from the main reservoir or source*, even though that reservoir or source is *not located on their lease*, is appurtenant to their title to the lease; but that right is common also to the holders of other leases which are supplied with oil from the same common source. All of such leaseholders have the right to recover the oil, and the only method so to do is to drill wells, and to pump them, in the absence of a flow without pumping. Necessarily the *first wells drilled* draw more from the common supply than others drilled later; and thus

there may be an unequal distribution among different leaseholders. But from the *very nature* of the situation that result is unavoidable, and loss to subsequent drillers occurring in that manner may be designated as damnum absque injuria; the policy of law being to *favor the diligent.* However, according to the rule which seems to be established by the decisions, and which appears to be founded upon elementary principles of right and justice, the right of one leaseholder to thus acquire more than his pro rata portion of the common reservoir is limited to the production of oil from a *natural flow* or from pumping by ordinary methods, to the *exclusion of the artificial method of vacuum pumps,* which is forbidden by Rule 40 of the Railroad Commission. Such is the effect of the decision of the United States Supreme Court in *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 20 S. Ct. 576, 583, 44 L. Ed. 729. In that case the State of Indiana, through its Attorney General, procured an injunction restraining the Ohio Oil Company from permitting the waste of natural gas from several wells drilled upon its leases, upon allegations, in substance, that the supply of natural gas which had been enjoyed by citizens in the surrounding territory had been greatly diminished. The suit was based upon the provisions of a statute of the state forbidding such waste. The statute was attacked by the oil company on the ground that its enforcement would constitute a taking of private property without adequate compensation, and therefore amounted to a denial of due process of law in violation of the Fourteenth Amendment of the Constitution. That contention was overruled, and the decree granting injunctive

relief against the oil company was affirmed In the opinion reference was made to the rule of decisions in the state of Indiana, to the effect that oil found in land does not become the property of the lease owner until it is reduced to possession, and had this to say:

"'If the analogy between animals ferae naturae and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are ferae naturae belong to the "negative community;" in other words, are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. *Geer* v. *Connecticut*, 161 U. S. 519, 525, 40 L. Ed. 793, 795, 16 S. Ct. 600. But whilst there is an analogy between animals ferae naturae and the moving deposits of oil and natural gas, there is *not identity* between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. It being true as to both animals ferae naturae and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not

take being until the particular subjects of the right become property being reduced to actual possession. *The identity, however, is for many reasons wanting.* In things ferae naturae *all* are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil *no such right exists in the public.* It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the *power which the lawmaker may exercise as to the two.* In the one, *as the public are the owners,* every one may be absolutely prevented from seeking to reduce to possession. No devesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer* v. *Connecticut,* 161 U. S. 519, 525, 40 L. Ed. 793, 795, 16 S. Ct. 600. *On the other hand,* as to gas and oil the surface proprietors within the gas field *all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property.* But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to

one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of *protecting all the collective owners*, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things ferae naturae, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed. *Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana* which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.' "

## APPENDIX F.

**(House Bill No. 136, Chapter 207, Session Laws 1917, Page 385, Codified as Sections 8013-8017, Compiled Oklahoma Statutes 1921.**

An Act providing for the creation of an oil and gas department under the jurisdiction of the Corporation Commission, authorizing the Corporation Commission to appoint a chief oil and gas conservation agent, and conferring exclusive jurisdiction on the Corporation Commission in reference to the conservation of oil and gas, and the inspection of gasoline and oil, the product of crude petroleum, and repealing all acts or parts of acts in conflict therewith, and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA: CORPORATION COMMISSION—OIL AND GAS DEPARTMENT.

SECTION 1. The Corporation Commission is hereby empowered and authorized to *create and establish an oil and gas department* under the jurisdiction and supervision of the Corporation Commission, and is hereby authorized to appoint with the approval and consent of the Governor, *a chief oil and gas conservation agent* who shall have charge of the oil and gas department herein authorized.

EXCLUSIVE JURISDICTION OVER OIL AND GAS MATTERS CONFERRED ON CORPORATION COMMISSION.

SECTION 2. All authority and duties *now conferred* upon the Corporation Commission or *other departments of the State government in reference to the conservation of oil and gas* and the drilling and *operating* oil and gas wells and the construction and regulation of oil and gas pipe lines, are hereby conferred exclusively upon the Corporation Commission.

RULES AND REGULATIONS—ABANDONED OIL AND GAS WELLS.—PLUGGING.

SECTION 3. The Corporation Commission is hereby authorized to prescribe rules and regulations for the plugging of all abandoned oil and gas wells. The same shall be plugged under the direction and supervision of the conservation agents of the Corporation Commission as may be prescribed by the Corporation Commission. All orders and regulations in reference to plugging wells shall be made after general hearing *as now prescribed by law for the promulgation of orders by the Corporation Commission.*

JURISDICTION TO INSPECT ALL OIL PRODUCTS COMPRESSED.

SECTION 4. Jurisdiction is hereby conferred upon the Corporation Commission to inspect all oils and liquids the product of petroleum or other bituminous substances or into which the product of petroleum enters, by whatever name called, which may or can be used for illuminating, heating or power purposes manufactured in this State or brought into it, before the same are consumed, used, sold or offered to be sold or disposed of to merchants, consumers, or other persons within this State, and the Corporation Commission is hereby authorized to appoint, with the approval of the Governor, oil inspectors *who shall perform the duties now prescribed by Chapter 96, Session Laws 1915,* and to perform such other duties as may be required by general rules and regulations of the Corporation Commission.

COMPENSATION FOR OIL INSPECTOR.

SECTION 5. The Oil Inspector hereby authorized shall receive the compensation now provided in Chapter 96, Session Laws 1915, for the inspection of oils and liquids.

REPEAL OF CONFLICTING ACTS.

SECTION 6. All acts and parts of acts in conflict herewith are hereby repealed.

EMERGENCY.

SECTION 7. For the preservation of the public peace, health and safety an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in force from and after its passage and approval.

Approved February 16, 1917.

## APPENDIX G.

*Session Laws* 1915.

CHAPTER 197.

*Natural Gas—Waste.*

(House Bill No. 395.)

AN ACT to conserve natural gas in the State of Oklahoma, to prevent waste thereof, providing for the equitable taking and purchase of same, conferring authority on the Corporation Commission, prescribing a penalty for violation of this Act, repealing certain acts, and declaring an emergency.

*Be it Enacted by the People of the State of Oklahoma:*

Waste Prohibited.

SECTION 1. That the production of natural gas in the State of Oklahoma, in such manner, and under such conditions as to constitute waste, shall be unlawful.

Waste Defined.

SECTION 2. That the term waste, as used herein in addition to its ordinary meaning, shall include escape of natural gas in commercial quantities into the open air, the intentional drowning with water of a gas stratum capable of producing gas in commercial quantities, underground waste, the permitting of any natural gas well to wastefully burn and the wasteful utilization of such gas.

Conservation of Gas.

SECTION 3. That whenever natural gas in commercial quantities, or a gas bearing stratum, known to contain natural gas in such quantity, is encountered in any well

drilled for oil or gas in this state, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating waters. Any unrestricted flow of natural gas in excess of two million cubic feet per twenty-four hours shall be considered a commercial quantity thereof; provided, that if in the opinion of the Corporation Commission, gas of a lesser quantity shall be of commercial value, said Commission shall have authority to require the conservation of said gas in accordance with the provisions of this Act; and provided, further, the gauge of the capacity of any gas well shall not be taken until such well has been allowed an open flow for the period of three days.

Excess Gas Supply—Apportionment.

SECTION 4. That whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common

sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.

"Common Purchaser"—Fair Treatment.

SECTION 5. That every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines, or gathering lines without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another save as authorized by the Corporation Commission after due notice and hearing; but if any such person, firm or corporation, shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. It shall be unlawful for any such common purchaser to discriminate between like grades and pressures of natural gas, or in favor of its own production, or of production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion that such production bears to the total production available for marketing. The Corporation Commission shall have authority to make regulations for the delivery, metering and equitable purchasing and taking of all such gas and shall have authority to relieve any such common purchaser, after due notice and hearing, from the duty of purchasing gas of an inferior quality or grade.

## Hearings Before Corporation Commission—How Conducted.

SECTION 6. That any person, firm or corporation, or the Attorney General, on behalf of the state may institute proceedings before the Corporation Commission, or apply for a hearing before said commission, upon any question relating to the enforcement of this Act; and jurisdiction is hereby conferred upon said commission to hear and determine the same, said commission shall set a time and place when such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein by publication in some newspaper or newspapers having general circulation in the state, and shall in addition thereto cause notice to be served in writing upon any person, firm or corporation, complained against in the manner now provided by law for serving summons in civil actions. In the exercise and enforcement of such jurisdiction said commission is authorized to summon witnesses, make ancillary orders, and use such means and final process including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations as now provided by law.

## Appeals to Supreme Court.

SECTION 7. That appellate jurisdiction is hereby conferred upon the Supreme Court of this state to review the orders of said commission made under this Act. Such appeal may be taken by any person, firm or corporation, shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the Corporation Commission. Said orders so appealed from, may be superseded by the commission or by the Supreme Court upon such terms and conditions as may be just and equitable.

Power of Corporation Commission—Rules and Regulations.

SECTION 8. That the Corporation Commission shall have authority to make regulations for the prevention of waste of natural gas, and for the protection of all natural gas, fresh water, and oil bearing strata encountered in any well drilled for oil or natural gas, and to make such other rules and regulations, and to employ or appoint such agents, with the consent of the Governor, as may be necessary to enforce this Act.

Acceptance by Pipe Lines.

SECTION 9. Before any person, firm or corporation shall have, possess, enjoy or exercise the right of eminent domain, right of way, right to locate, maintain, construct or operate pipe lines, fixtures, or equipments belonging thereto or used in connection therewith, for the carrying or transportation of natural gas, whether for hire or otherwise, or shall have the right to engage in the business of purchasing, piping, or transporting natural gas, as a public service, or otherwise, such person, firm or corporation, shall file in the office of the Corporation Commission a proper and explicit authorized acceptance of the provisions of this Act.

Duties of Mine Inspector Unchanged.

SECTION 10. That nothing contained in this Act shall be construed to interfere with any duties now imposed by law upon the Chief Mine Inspector of the state or his deputies.

Validity of Several Sections of Act Independent.

SECTION 11. That the invalidity of any section, subdivision, clause, or sentence of this Act shall not in

any manner affect the validity of the remaining portion thereof.

Penalties for Violation.

SECTION 12. That in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, directly or indirectly violating the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of contempt jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000.00) or by imprisonment in the county jail not to exceed thirty (30) days, or by both such fine and imprisonment.

Emergency.

SECTION 13. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in force from and after its passage and approval.

Approved March 30, 1915.

(1607)